# ADMINISTRATIVE LAW 1951

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION


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### ANNUAL MEETING PROGRAM

Monday, September 17, 11:00 A.M.

Council Meeting at Office of Robert M. Benjamin, 40 Wall Street, New York City. In addition to members of the Council all Chairmen of Section Committes are invited to attend.

Tuesday, September 18, 10:00 A. M.

Annual meeting of members of the Section. Hotel Roosevelt, New York City. Luncheon at Hotel Roosevelt. Speaker to be announced.

2:00 P.M.—

Annual meeting continued. Speaker will be Manly Fleischmann, Administrator, National Production Administration. Business to be transacted. Officers to be elected.

### COMMITTEES ON SECTION ADMINISTRATION

***Committee on Organization and By-Laws***

At the Annual Meeting of the Administrative Law Section of the American Bar Association, held on September 13, 1950, the Section adopted an amendment to Article III, Section 2, of the Section By-laws making the retiring Chairman an ex officio member of Council. The Section further adopted a recommendation that the necessary approval of the House of Delegates be secured. The amendment is as follows:

> There shall be a Council which shall consist of the Chairman, the last retiring Chairman, the Vice-Chairman, and the Secretary, all of whom shall be members ex officio together with eight other members to be elected by the Section as hereinafter provided.

Pursuant to the provisions of Article X, Section 3, of the Constitution and By-Laws of the American Bar Association, the amendment was presented to the Board of Governors and was reported to the House of Delegates for approval at the February, 1951, meeting. The amendment was approved on Monday, February 26, 1951, at the first session of the House of Delegates.

LOUISA WILSON, Chairman

***The National Committee***

Except for the "housekeeping committees", the Section's committees report to the Administrative Law Section through the National Committee. The National Committee is composed of the chairmen of those various committees and, in addition, two indi-

vidual Section members and the chairman of the National Committee. Since the members of the Committee are dispersed from Boston to Seattle, much of the Committee's business has to be undertaken by correspondence, with such personal meetings amongst such of the members as can be gathered from time to time for discussion of Committee business. Several meetings of this latter form have been held since the last annual meeting of the Section; and a great deal of correspondence with the members of the National Committee has been carried on.

The purpose of the National Committee throughout its existence has been to coordinate the work of the particular committees, particularly as to uniformity of legislative proposals which might be supported for Section or Association endorsement or opposition. In respect of legislation, the Section has committed to the National Committee the duty and grave responsibility of representing the American Bar Association in legislative matters affecting the Administrative Procedure Act. The Section had that authority delegated to it by the Board of Governors at its meeting February 27, 1950 (75 Repts. A. B. A. 446). By resolution at that time, the Board of Governors affirmed resolutions of the House of Delegates in 1944 and 1945 directing the seeking of the Federal Administrative Procedure Act, continued study and efforts to secure other and additional measures for bettering the administration of justice involving administrative agencies, and the cooperation of the Association, its organization and members in securing these ends. Thereupon, it directed that the Section of Administrative Law—

> ". . . by all necessary and proper means including appearances before legislative committees (1) perserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additonal measures to like purposes, and (3) procure the assistance of officers, units, and members of this Association as well as the cooperation of those of state and local bar associations; . . ."

The philosophy behind such delegation of authority is plain—legislation affecting the Administrative Procedure Act and additional measures to like purposes can be of such emergency occurrence that before the usual requirements of seeking approval of the Board of Governors could be fulfilled, the possibility of taking timely measures designed to be helpful often would have been lost.

Such an emergency occurred about a year ago in connection with the exemption from the hearing requirements of the Administrative Procedure Act of deportation proceedings in the Immigration and Naturalization Service. This was sought by the Bureau of Immigration and Naturalization shortly after the decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, holding the Administrative Procedure Act applicable to deportation proceedings. As was forecast at our last annual meeting, that exemption—attached as a rider to the Supplemental Appropriation Act of 1951—was adopted, in spite of every effort which the Section's officers could exert. By way of comment on the claims of the Immigration and Naturalization Service in obtaining that exemption that application of the Act to hearings would cost in the neighborhood of $30,000,000 a year, there is quoted the following from a communication to the Chairman of the National Committee from Hon. Francis

E. Walter, ranking majority member of the House Judiciary Committee:

> "In reply to your recent letter concerning the Administrative Procedure Act, I assure you that I will make every effort to remove from the appropriation bill that language which exempts the Immigration and Naturalization Service from the purview of the Administrative Procedure Act. As proof of what you said about the extravagant and ill-founded claims of the Immigration Service, I call your attention to the last annual report of that Agency which shows that there was litigation under the Act in only 37 cases. This, of course, I hope to use to good advantage when the appropriation bill is considered."

In accordance with the resolution of the Section at the annual meeting, the Section's Committee on Immigration and Naturalization actively sought repeal of the exemption of deportation proceedings before the Bureau of Immigration and Naturalization. In March, 1951, Mr. Wasserman, Chairman of the Committee on Immigration and Naturalization, appeared before the joint subcommittee of the Senate and House Committees on the Judiciary and presented the position of the Association and the Section in opposition to the exemption, which was carried forward in the drafts of bills to restate the immigration laws, S. 716 and H. R. 2379, 82d Cong., 1st Sess., before the joint committee. His prepared statement and his testimony were well received. As of July 1, 1951, however, the committee has as yet produced no report or bill; but it is known that the House and Senate Committees are working on their reports, and it is confidently expected that the bills produced will accord no exemption in deportation or expulsion cases (as distinguished from exclusion cases). It is, therefore, the belief of the committee that satisfactory progress is being made.

A somewhat similar attempt to gain an exemption was, for a time, feared following the decision April 16, 1951, of the Supreme Court of the United States in *Riss & Co.* v. *United States,* No. 479, O. T. 1950. That case held the Administrative Procedure Act applicable to proceedings before the Interstate Commerce Commission for a certificate of public convenience and necessity to extend operation as a common carrier of a motor carrier under §207(a) of the Interstate Commerce Act. The opinion of the Supreme Court was a brief, *per curiam* opinion merely reversing the special three-judge district court on the authority of the *Sung* case, and announced less than a week after the argument of the case. Within ten days' time, the Section's officers were informed of rumors that a prompt move was under way by the administrative officials concerned to seek an exemption from the Administrative Procedure Act. The Chairman of the National Committee thereupon directed letters to a number of key committee and subcommittee chairmen in the Senate and House, together with individual Senators and Representatives having a particular interest in the Administrative Procedure Act, calling attention to the decision of the Supreme Court in the *Riss & Co.* case, and the possibility that it might provoke another effort to secure exemption from the requirements of the Act respecting hearing examiners. With substantial unanimity, the Congressional representatives answered that they would be alert to forestall any such move. In addition, Mr. Stephan, Chairman of the Committee on Transportation, immediately contacted the members of his com-

mittee and others, who promptly considered steps to be taken. Within a brief period of two or three weeks, we were reliably informed that the Interstate Commerce Commission had no disposition to seek an exemption from the Act, but would comply. Apparently, there has been no revival of the earlier reaction to seek exemption. The whole-hearted way in which the members of the Section and others responded to word of this threat indicates that matters of this kind can be handled if only sufficient vigor is brought to their solution.

Because of a lack of agreement as to the wise course to be pursued, no such vigor was brought to the assistance of a proposal of Senator McCarran to repeal *all* (save one) of the exemptions from the Administrative Procedure Act adopted since that Act was passed (the exception is the exemption of proceedings under the Universal Military Training and Service Act). The exemptions proposed by Senator McCarran to be repealed are as follows:

> Exemption of the Veterans' Emergency Housing Act of 1946, adopted as a rider to the First Supplemental Appropriation Act, 1947, §302(a) (Act of August 8, 1946, 60 Stat. 910, 918-919), and, redundantly enough, also adopted as a rider to the Social Security Act Amendments of 1946, Title VI, §601 (Act of August 10, 1946, c. 951, 60 Stat. 978, 993).
>
> Exemption of the Sugar Control Extension Act of 1947, Act of March 31, 1947, §6 (a), c. 30, 61 Stat. 35, 37. This act has to do with distribution, allocation and pricing of sugar.
>
> Exemption of the Housing and Rent Act of 1947, Act of June 30, 1947, §210, c. 163, 61 Stat. 193, 201. This Act removed rent control from the Emergency Price Control Act and provided for a limited extension of rent controls and modifications in the administration of federal rent control.
>
> Exemption of the embargo on munitions provided by the Act of July 2, 1940, §6, c. 508, 54 Stat. 712, 714, and of the priorities and allocations provisions of the Second War Powers Act of 1942 (Act of March 27, 1942, c. 199, 56 Stat. 176, 177-180), as amended. These exemptions were provided for by the Second Decontrol Act of 1947 (Act of July 15, 1947, c. 248, 61 Stat. 321, 323, §5).
>
> Exemption of the amendments to the Housing and Rent Act of 1947 (above) by §301 of the Housing and Rent Act of 1948 (Act of March 30, 1948, c. 161, 62 Stat. 93, 99). This act further extended the period of rent controls, with modifications.
>
> Exemption of the export-licensing system under the Export Control Act of 1949, c. 11, 63 Stat. 7, 9, §7 (Act of February 26, 1949). This act provided a general export-licensing system to protect the domestic economy from drain of scarce materials, and to further foreign policy and national security.
>
> Exemption of proceedings under the International Wheat Agreement, by §3 (i) of the International Wheat Agreement Act of 1949, c. 772, 63 Stat. 945, 947 (Act of October 27, 1949). This act "implements" the International Wheat Agreement respecting exportation and importation of wheat and wheat flour.
>
> Exemption (except as to the provisions of §3 of the Administrative Procedure Act) of the Defense Production Act of 1950, §709, Pub. Law No. 774, c. 932, 81st Cong., 2d Sess. (Act of September 8, 1950). This act provides for priorities and allocations (until June 30, 1952) and for price and wage stabilization (until June 30, 1951), etc.
>
> Exemption of proceedings related to the exclusion or expulsion of aliens (so far as §§5, 7, and 8 of the Administrative Procedure Act are concerned), in the Bureau of Immigration and Naturalization,

Department of Justice, by the Supplemental Appropriations Act, 1951, Pub. Law No. 843, c. 1052, 81st Cong., 2d Sess., under the heading "General Provisions—Department of Justice" (Act of September 27, 1950). This provision was a rider in an appropriation act.

Exemption of the Federal Civil Defense Act of 1950, Pub. Law No. 920, c. 1228, 81st Cong., 2d Sess., §305 (Act of January 12, 1951). This act turns over to the respective states the responsibility for civil defense, and sets up a federal agency to coordinate and advise on state efforts, make plans, disseminate information, conduct training programs, make contributions to the state programs, and the like. The exemption of the Administrative Procedure Act is limited to a state of "civil defense emergency" if proclaimed by the President, and suspends other protective laws such as limitations on the power to contract, donation or use of property and services of the various departments for relief, clearing devastated areas, etc., except that just compensation under the Fifth Amendment shall be paid for property, or the use of property, belonging other than to the federal government.

Senator McCarran's effort to have all of the foregoing items repealed was made in connection with the consideration of the extension of the National Defense Production Act. On June 27, 1951, at a long Senate session, he pointed out that the philosophy of the original exemption of emergency agencies was not to set a pattern of exemption of functions because they were "emergency" in nature, but simply because those acts were due to expire very soon. He argued that where new functions are created, there should be a clear showing of some valid reason why the function should not be exercised in compliance with the Administrative Procedure Act before Congress approves an exemption. He felt that nothing in the emergency nature of the operations of the agency justified suspending the charter of rights in the Administrative Procedure Act. However, his amendment was defeated a few days later.

Senator McCarran's proposal for repeal of the various exemptions listed above has now been made the subject of a separate bill which he has introduced, S. 1770, 82d Cong., 1st Sess., and is now before the Section's Committee on Administrative Procedure Act for study and report. The question of supporting this bill is one which, so far as the Chairman of the National Committee is advised, has not yet come to a point where the ultimate Section view of it has crystalized. It has been a subject of differing views amongst the members of the Section's Council. It warrants the consideration of the entire Section at the annual meeting, and possible reference to the Board of Governors. At the same time, the Board of Governors, at its February meeting in Chicago, formally resolved to seek repeal of the exemption under the Civil Defense Act of 1950, and theretofore had resolved to seek repeal of the exemption of deportation proceedings before the Bureau of Immigration and Naturalization.

It may be noted that another specific exemption from the Administrative Procedure Act, not included in the list proposed by Senator McCarran for repeal, was adopted during the present year in the Renegotiation Act of 1951, §111, c. 15, Pub. Law No. 9 (Act of March 23, 1951). The question whether the functions covered by this act would have been within the rule-making and adjudication provisions of the Administrative Procedure Act were this exemption not included appears sufficiently substantial that it is questioned whether any need ex-

isted at all for a specific exemption, even if desirable.

Allied questions, of long-term interest to the Section, are involved in the matter of exceptions in the Administrative Procedure Act as originally adopted. Not only specific types of agencies and specific acts of Congress are exempted by §2, but taking the act as a whole the word "except", or its equivalent ("shall not apply", "but not", "unless", etc.), appears in every section of the act other than §1, which states only the title of the act. To be sure, many of the instances (27 in all) in which the word "except" itself is used constitute a use of the word in a double-negative sense and therefore are occasions of inclusion rather than exclusion. But on the whole, it appears that many of the exceptions—the price of original adoption of the Administrative Procedure Act—should be stricken, and that this work should be made substantial business of the Section. The problem is under active consideration by Mr. Young's Committee on the Administrative Procedure Act.

During the year, a special committee was set up with respect to contracts of attorneys with Indian tribes, to consider a statement of policy as to approval of such contracts announced by the Commissioner of Indian Affairs, November 9, 1950. Because of questions regarding the propriety and ethics of contracts complying in all respects with the policy pronouncement, it was asserted to the Section that some Indian tribes were having difficulty engaging counsel of their choice so as to be able to file claims with the Indian Claims Commission prior to the expiration of time to do so—that is, prior to August 13, 1951. The Board of Governors of the Association having adopted a resolution favoring a one-year extension of time for filing claims, in order to give an opportunity for reaching agreement with the Commissioner of Indian Affairs and the Secretary of Interior on proposed new regulations (a matter under active study by the Section's committee), the Chairman of the National Committee appeared in early July at a hearing on four measures to provide an extension of time and stated the Association's endorsement of a one-year extension of time for filing claims.

Other matters coming before the Committee will appear from the reports of the individual committees.

JOHN W. CRAGUN, Chairman

Editor's note: In connection with the reference to Senator McCarran's S. 1770 in the report of the National Committee and also the study of specific exemptions and exceptions in the Procedure Act itself which is discussed in the report of the Committee on the Administrative Procedure Act, it is desired to solicit the views of the Section membership as a whole as to what exemptions, if any, ought to be repealed. For that reason the following list of exemptions and exceptions in the Act is published to supplement the reports of those committees and to facilitate consideration of the problem. The list is not exhaustive but contains all of the items most likely to be attacked. The Chairman of the Committee on the Administrative Procedure Act would appear to be the proper recipient of the members' views.

## EXEMPTIONS AND EXCEPTIONS IN THE ADMINISTRATIVE PROCEDURE ACT

*Section 2 (a):* except as to the requirements of section 3 the following are excluded from the operation of the Act:

"(1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them,

(2) courts martial and military commissions,

(3) military or naval authority exercised in the field in time of war or in occupied territory, or

(4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; and the Veterans Emergency Housing Act of 1946."

*Section 3:* the entire section is subject to exception "to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." Subsection (a) requires publication in the Federal Register among other things of "(3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, *but not rules addressed to and served upon named persons in accordance with law.*" Subsection (b) provides for the publication or availability of opinions and orders "except those required for good cause to be held confidential and not cited as precedents." Subsection (c) provides for the availability of public records "except information held confidential for good cause found."

*Section 4:* the entire section is subject to exception "to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States, or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." Subsection (a) providing for notice of proposed rule making through publication in the Federal Register is subject (unless notice or hearing is required by statute) to the exception that it does not apply to "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

*Section 5:* the entire section is subject to exception "to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives", plus the requirement that there be involved a case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Subsection (c) on the separation of functions is subject to the exception that "This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or

carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

*Section 9 (b):* provides that "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

*Section 10:* the entire section is subject to exception "so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

Subsection (b) provides that "agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Subsection (c) provides "Except as otherwise expressly required by a statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

W. F. SCHULZ, JR., Acting Editor

## COMMITTEES ON PARTICULAR FEDERAL AGENCIES OR ACTIVITIES

### *Committee on Immigration and Naturalization*

On December 11, 1950, the Supreme Court ruled in *Kristensen v. McGrath,* 340 U. S. 162, that a deportable alien might seek review of an order directing his departure from the United States through declaratory judgment and that he was not compelled to proceed through habeas corpus. S. 716 and H. R. 2379, introduced in the 82nd Congress by Senator McCarran and Congressman Walter respectively, seek to seriously limit the *Kristensen* decision and to impose rather burdensome conditions upon judicial review generally in immigration and citizenship cases. These bills would make determinations of fact and the exercise of discretion in immigration matters final and not subject to review.

Questions of law in immigration matters would be reviewed solely through the writ of habeas corpus and declaratory judgment to establish American citizenship would be granted only to persons in the United States.

In addition, actions for declaratory judgment to establish citizenship would be denied to individuals who are in detention in immigration cases or who have not instituted the action within five years after a final administrative denial of such citizenship. The Committee on Immigration and Naturalization is deeply concerned with these proposed limitations upon judicial review both for citizens and aliens. It is our feeling that apart from constitutional objections, no person should be denied his American citizenship without an opportunity to obtain full judicial review of the law and

the facts of his case. We believe that the sense of the proposals to limit judicial review is to oust the courts of review over factual and discretionary decisions of the immigration authorities and to grant them blank checks to do as they will. There is no compelling reason for these proposals and we strongly urge that the present scope of court review as enunciated by the *Kristensen* case and as set forth in Section 10 of the Administrative Procedure Act be maintained. The checks and balances exercised by the judiciary today insure greater impartiality in our administrative officials and should be preserved.

On March 21, 1951 the chairman of the committee on Immigration and Naturalization testified before a joint committee of the Senate and House with reference to S. 716 and H. R. 2379 and at that time urged that the present scope of court review in immigration and citizenship matters be maintained. We also urged, as we do now, that the exemption accorded to the Immigration Service from the Administrative Procedure Act by Public Law 843, 81st Congress, be repealed. We understand that Senator McCarran has pledged himself to repeal this exemption in a letter addressed to the president of the American Bar Association on May 29, 1951. We endorse Senator McCarran's proposed repeal.

On January 8, 1951 Senator Langer introduced S. 149 which would provide that aliens who have arrived in the United States shall not be excluded without a hearing. This bill is similar to H. R. 7476, 81st Congress which was endorsed by this committee in its previous report. We believe that denial of hearings even to arriving aliens is not in keeping with our traditional concepts of Anglo-American jurisprudence. We know that during hostilities, even alien enemies were accorded hearings, and that under the emergency detention provisions of the Internal Security Act of 1950 individuals are to be accorded hearings before they may be detained. We feel that a sensible procedure can be worked out consistent with our internal security to accord arriving aliens appropriate hearings.

JACK WASSERMAN, Chairman

***Committee on Advertising, Trade and Securities Regulation***

The Committee considered Senator Murray's Bill to restrict the sale or delivery of automobile tires to independent tire dealers and Senator Langer's amendment extending the scope of the Bill to all products (S. 629). The Bill was unanimously disapproved by the entire Committee. In conversations with the Administrative Assistant of the Senate Committee on the Judiciary, the Chairman learned that there was little likelihood that action would be taken on this Bill and in any event, no action would be taken without public hearing. Under the circumstances, it was decided that any Bar Association action with respect to this proposed legislation was unnecessary at this time.

The proposed amendments to the Rules of the Federal Trade Commission providing for the entry of Default Orders were carefully considered by the Committee and numerous comments were received.

"1. The advisability of having the fifteen day limitation in the second paragraph of §2.5 (a) has been questioned because it might be construed to mean, or the public might understand it to mean that offers of settlement or proposals of adjustment, if not made within fifteen days after service of the complaint, may

not thereafter be made. Questions will arise as to whether applications should be made for extension of such time and whether such time could be extended. If this is so, it is obvious that compromise and settlement procedures will be seriously jeopardized.

"2. In the last sentence of §2.5 (b) three cumulative steps are provided in order to avoid entry of the provisionary order,— 'shall file an answer within the time designated in the complaint; shall appear at the time and place so fixed; and shall show cause why the said order . . . should not be entered. . . .' Attention is directed to the possibility that this does not mean the same as what was stated in the April 11th release,— 'If the respondent contests the proceeding, then the provisionary order "shall be without effect", according to the Rules.' It has been suggested that the language be revised to make it clear that an answer tendering issue on one or more of the important points in the complaint be sufficient, without more, to render the provisionary order 'without effect'. I suppose that this is more a problem of language than of substance because I am sure that the Commission will regard an answer tendering issues as being sufficient to bar entry of the provisionary order.

"3. Some question has been raised as to the 'due process' of entering an order by default. This possibility is projected on the theory that such an order could conceivably be entered upon charges not supported by sworn testimony. Your attention is directed in this connection to part (c), 'Separation of Functions', of §5 and to §8 of the Administrative Procedure Act. See also pages 17, 20, 21, 22, 23 and 24 of the report of the Committee on the Judiciary, Administrative Procedure Act, Report No. 752, 79th Cong., 1st Sess.

"4. Subdivision (a) of §2.5, as well as the last sentence of subdivision (b), continues the Commission's practice of setting a day for hearing at the same time that the complaint is served. Although this seems to be required by the statute, the practice has been criticized as being 'unnecessarily confusing and perhaps annoying to respondents who have no lawyers and even to attorneys who are not too familiar with F. T. C. practice'. Since hearings frequently are not held on the original date fixed, perhaps the problem could be solved by indicating, in a footnote to the complaint, that the time and place so set is merely tentative and that if an answer is filed the time and place will be subsequently confirmed or reset by the trial examiner. In that event, it is assumed that the hearing will be held at that time and place.

"5. In subdivision (b) of §2.5 with respect to the contents of the order, the words, 'which may appear' are used and even though later in the paragraph it is stated, 'such order shall issue', the use of the potential in the first quoted words creates a doubt as to whether, in the event of default, the provisionary order without change will be entered and whether there is a real assurance that an order containing other wording or provisions actually will not be entered."

The collateral comments were submitted to the Commission in the form above set forth. By letter dated May 14, 1951, Chairman James M. Mead, of the Commission, acknowledged receipt of the Committee's report on the proposed amendments and said, in addition, the following:

> "The interest of your committee in this revision of the Commission's rules and the comment and suggestions concerning certain features of the rules are appreciated. In connection with the comment concerning the 15-day limitation appearing in the second paragraph of §(a) of Rule V, the Commission has approved a change in this provision which will be published in the Federal Register in due course. The other suggestions contained in your letter will have careful considera-

tion in connection with the early operating experience under the revision."

The amendments, as finally adopted, were published in the Federal Register of May 18, 1951. A copy is sent you herewith. The fifteen day limitation, which was eliminated, was brought to our attention by Frank R. Pitt.

As you will note from Chairman Mead's letter, the Commission promises to give consideration to our other suggestions in connection with the early operating experience under the revision. This would imply that if, in the utilization of the Rule by the Commission, objectionable features appear or possible improvements are indicated, the Commission will be receptive to suggestions from the Committee. For that reason, the Chairman would suggest that continued consideration be given to the Rule as amended so that when this Committee is reconstituted in the coming year, it may consider and take action if such be necessary.

HERMAN TOCKER, Chairman

***Committee on Transportation***

During the year, the Committee's membership and certain subcommittees, more fully discussed below, have reviewed various matters dealing with transportation and various legislative proposals. No final action has been taken this year with respect to any of these matters for the reasons indicated. The matters considered are as follows:

1. The Interstate Commerce Commission rendered an important decision on November 6, 1950, in its Docket No. MC-F-4401, *Pacific Inter-Mountain Express Company* control of *Keeshin Freight Line, Inc.* That decision disapproved the acquisition of one motor carrier by another where the effect would be to set up a new coast-to-coast motor transportation company.

Of the membership of eleven commissioners, nine participated in a majority opinion, disapproving the application upon finding that it was not consistent with the public interest. One member did not participate and one member, Commissioner Mahaffie, dissented upon the ground that, in his view, the majority opinion was based upon protection of rail carriers rather than upon the question of public interest.

The question raised seemed sufficiently important to merit careful study by this Committee. A Sub-Committee was appointed, consisting of attorneys who represent both railroads and other forms of carriers, and whose practice would permit them to be available for conferences from time to time in Washington, D. C. During the process of this study, the Commission, on April 2, 1951, issued a report on reconsideration, in which the majority disavowed the minority's interpretation of the report and affirmed its original finding. Subsequently,in May, 1951, we were advised that the matter had been taken to a three-judge court in California. Accordingly, it seemed inappropriate, with the matter before the Courts, for the committee to publish its report of the soundness of the decision.

Your Committee recommended that the Sub-Committee be continued, pending conclusion of Court action, and thereafter make such recommendations, if any, as seem appropriate.

2. On April 16, 1951, the Supreme Court decided an important case—*Riss & Co. v. U. S.*, 71 S. Ct. (Adv. Sh.) 620. In a four-line *per curiam* opinion, the Court reversed the lower court and set aside an order of the Interstate Commerce Commission, citing

one leading case, *Wong Yang Sung v. McGrath,* 339 U. S. 33. The lower court's opinion shows that the basis of the decision was that the Examiner who conducted the hearing had not been appropriately qualified as a Hearing Examiner under the provisions of the Administrative Procedure Act.

The impetus for your Committee's activity was an informal report that the Interstate Commerce Commission was planning to avoid the impact of that decision by obtaining a legislative rider to an appropriations act to exclude the Interstate Commerce Commission from the provisions of the Administrative Procedure Act.

Your Committee is vigorously opposed to such procedure. It is aware of the importance of the problem to the Interstate Commerce Commission and to litigants. It views with regret the success of the Immigration Service in recently obtaining such an exemption by the device of an amendment to another Appropriations Act.

It believes that Congress in enacting, virtually unanimously, the Administrative Procedure Act, intended that it should apply to all permanent civilian administrative agencies, and that, if good cause appears for any exemptions, it should be accomplished deliberately through study and hearings by appropriate Congressional Committees and not hastily by riders to appropriation measures.

These views were communicated to the National Committee of the Section on Administrative Law. There are others who share these views and your Committee has been advised that the reported plan of the Interstate Commerce Commission to seek a rider to an appropriation act has been abandoned and that the solution of the *Riss* decision will be reached in an orderly way.

3. While your Committee has earned no credit except by reading the Bulletins of the Administrative Law Section, it desires to express its whole-hearted approval and praise of the readable and scholarly editing of the Bulletin. It has been found to be of tremendous value in keeping abreast of legislative and judicial trends and of Section activities.

ALBERT E. STEPHAN, Chairman

## COMMITTEES ON PARTICULAR LEGISLATION OR PROPOSALS

### *Committee on the Administrative Court Proposal*

The occasion for the appointment of this Committee was the introduction by Senator McCarran on January 27, 1949, of a bill (hereinafter referred to as "the McCarran Bill") for the creation of an Administrative Court of the United States (S. 684, 81st Cong., 1st Sess., amended by Senator McCarran on April 5, 1949).[1]

The McCarran Bill was the subject of debate at the annual meeting of the Section in St. Louis in September, 1949. Since that debate disclosed a divergence of opinion within the Section,[2] it was decided that a long-range study should be made not only of the particular bill but of the whole question of the desirability or undesirability of a specialized court of general jurisdiction for the judicial review of administrative

[1] The Bill as amended was reintroduced by Senator McCarran in the 82nd Cong., 1st Sess., on January 8, 1951, as S. 14.

[2] The main argument for the Bill, by Louis G. Caldwell, is printed in the January, 1950, American Bar Association Journal (36 A. B. A. Jour. 13). The main argument against the Bill, by Alfred J. Schweppe, followed generally his article in the July, 1949, American Bar Association Journal (35 A. B. A. Jour. 533).

agency action; and that task was assigned to this Committee, with instructions to report in 1951.

At the end of its study this Committee, which approached its task with open mind and with deference to Senator McCarran's judgment, has come to the conclusion that no such specialized court would be desirable and that the function of judicial review had best be left with the existing Federal Courts of Appeals and District Courts.[3]

Since our conclusion would be against any specialized court of general jurisdiction for the judicial review of agency action, whatever the structure of such a court might be, we do not reach detailed consideration of the particular provisions of the McCarran Bill; but a brief outline of its principal provisions is desirable as background to the later discussion and as a basis for such further consideration as the Section may desire to give to the question.

The McCarran Bill provides for an Administrative Court of the United States, to consist of a chief judge and four associate judges to be appointed by the President with the advice and consent of the Senate.[4] On request of the Court, any active or retired judge of the United States might on his consent be assigned by the chief judge of his court or the Chief Justice of the United States to temporary duty. By specific reference to the organization and procedure of the Court of Claims (§§3 and 5 (c)), provision is made for the appointment of commissioners. The Court would be officially stationed in the District of Columbia, but could sit (by its judges or commissioners) anywhere in the United States (§3).

The Court would have permissive jurisdiction in cases "otherwise cognizable or pending in any court of the United States other than the Supreme Court"[5]: (a) "in any case involving the judicial review of agency action . . . at the request of any person who (1) desires to bring such an action or (2) has brought it elsewhere but seeks to transfer it to the court before trial, argument, or submittal for decision;" and (b) "in any case involving the civil enforcement of the rules, orders, or investigative demands of any agency . . . at the request of any person against whom such an action has been brought but has not been tried, argued, or submitted for decision".[6] It will be observed that the jurisdiction of the Court in these cases is discretionary with the Court; that such jurisdiction may be invoked only by a party other than an agency, whether such outside party be plaintiff or defendant; that, except where such jurisdiction is invoked by an outside party and taken by the Court, the regular Federal courts would still have jurisdiction; that the cases in which the court might take jurisdiction would include cases cognizable in Courts of Appeals, in three-judge District

[3] The Committee is unanimous in the view that no such specialized court is desirable at the present time. It is close to unanimous in the view that no such court would be desirable in the foreseable future.

[4] Section 1. The Bill provides that each judge "shall be learned and experienced in both the general and administrative laws of the United States but shall not, within five years of such appointment, have served as an officer or employee in the executive branch of the Government of the United States"; also that "No more than three of the judges of the court shall be appointed from the same political party."

[5] The Bill excepts (1) cases otherwise cognizable in the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals, or the Tax Court, and (2) other cases in so far as a money judgment is sought, an issue of tax liability is presented, or the grant or denial of a patent is questioned (§ 2).

[6] Section 2 (a) and (b). As to further jurisdiction conferred by Section 2 (c), see Schweppe, *The Administrative Court Bill: An Analysis*, 35 A. B. A. Jour. 533 at 535.

Courts and in single-judge District Courts, and that the Court would thus have both trial and appellate jurisdiction. The Bill provides further a procedure for review by three or more of its judges sitting as an appellate division of cases determined by one of its judges (§4 (a)).

There is, finally, provision for review by the Supreme Court on writ of certiorari or appeal and for certification of questions to the Supreme Court.[7]

As background for our consideration of the general question, the Committee has made two special studies, the results of which appear in appendices to this report.

Appendix I is a memorandum on the history of administrative court proposals in the American Bar Association, prepared for the Committee by one of its members, Ralph M. Hoyt, covering the period from the creation of the Association's Special Committee on Administrative Law in 1933. The latest of the proposals there discussed (other than the present proposal), Senator Logan's 1938 bill for a United States Court of Appeals for Administration, is also the one that came closest to the proposal presently under consideration. The 1938 report of the Special Committee on Administrative Law, under the chairmanship of Dean Roscoe Pound, opposed the 1938 Logan Bill for reasons (quoted in the appendix) paralleling some of those which have led us to our present conclusion (63 A. B. A. Rep. 331, 355-356). The Committee report recommended instead a wholly different approach, which, supported by the Association, eventuated in the adoption of the Logan-Walter Bill, passed by the Congress but vetoed by the President. Thereafter the activities of the Association were in the direction of what finally became the Administrative Procedure Act of June 11, 1946; and the question of an administrative court did not arise again until 1949.

Appendix II is a memorandum on the organization and jurisdiction of administrative courts in civil law countries, prepared for the Committee by another of its members, Dean E. Blythe Stason. In view of the success of special administrative courts in those countries, it appeared to us that we should inquire whether that experience would lend support to the proposal for a special court here. It is the conclusion of the memorandum, and of the Committee, that in view of the other differences in legal and governmental systems, the civil law experience does not lend such support.

While, as we have said, our general conclusion precludes detailed consideration of the particular provisions of the McCarran Bill, there is one major aspect of the Bill which we have necessarily considered. The Bill would set up an Administrative Court of discretionary jurisdiction, to which (subject to the Court's accepting jurisdiction) non-agency parties to cases within its cognizance could resort or not at their option, with the alternative option of litigating in the existing Federal courts. We realize that the optional feature was introduced in "an attempt to be cautious, temperate and fair in launching a worth-while experiment . . ."—to give "an opportunity to appraise the experiment in actual operation . . ."[8] Nevertheless we believe that such an experiment could not be effectively made on

[7] Section 4 (c). We note, for consideration if the Bill is to be further considered, a doubt whether the provision for review by the Supreme Court "(1) to the extent that such review may be required by the Constitution" may not be illusory (see, *e. g.*, *Ex parte McCardle*, 7 Wall. 506).

[8] Caldwell, *The Proposed Federal Administrative Court: The Arguments for its Adoption*, 36 A. B. A. Jour. 13 at 16.

an optional basis, that much of such value as a specialized single court would have would be lost if its jurisdiction were not exclusive, and that concurrent jurisdiction might well create an unseemly appearance of competition between the Administrative Court and other Federal courts for the favor of litigants. We therefore take up the general question for our consideration on the assumption that any specialized administrative court of general jurisdiction should have exclusive jurisdiction over all matters within its cognizance.[9]

We turn now to the reasons that have led us to our conclusion that a specialized court of general jurisdiction for the judicial review of administrative agency action would be undesirable.

1. The most fundamental of these reasons is that in this field, as in others, there is affirmative advantage in adjudication by courts of broad jurisdiction, like the existing Courts of Appeals and District Courts, which can bring to the solution of particular legal problems a wide range of experience, knowledge and understanding and a proper detachment from narrower interests. This was one of the principal grounds on which the Judicial Conference of the United States based its opposition to the McCarran Bill.[10] The point has, we think, never been better put than in an article on a related subject by former District Judge Rifkind in the June, 1951, issue of the American Bar Association Journal [11]; and we refer to that article for a fuller expression of our own views.

2. A specialized court would cover a field so varied that there could in any event be no real specialization or particular expertness in the substantive aspects of the many segments of that field. It may be suggested that specialization could be accomplished by provision for a number of separate divisions of the court; but such fragmentation would be inconsistent with the basic philosophy of the main proposal, while at the same time it would greatly increase expense and practical difficulties of judicial administration.

Certainly some degree of familiarity with substantive problems would be acquired by a specialized court in time, but that is true also of the existing regular courts; and if a new court were set up, such familiarity as the existing regular courts have acquired (*e. g.*, with regard to the National Labor Relations Board) would meanwhile be lost.

3. Such effective specialization as there would be would be in the field of administrative procedure. But this is a field in which, we believe, specialization is not needed. The Administrative Procedure Act furnishes a ready guide; and such problems as exist can be dealt with effectively by the regular courts, properly assisted by counsel. Indeed (as we have suggested in paragraph 1 above) there is advantage in having such problems dealt with by courts regularly dealing with problems of judicial procedure.

4. Perhaps some of the initial support

[9] Without considering whether existing provisions for optional proceedings with respect to some patent matters, tax matters, and claims against the United States are in themselves desirable, we are of the opinion that such instances do not support the optional feature with regard to a court of general jurisdiction in the judicial review of agency action. Further, in view of our general conclusion, we do not reach the question whether, if some optional feature were desirable, it would be desirable to limit the option to non-agency parties.

[10] Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 22-24, 1949, pp. 20-22, following a report of a committee of the Judicial Conference under the chairmanship of Chief Judge Hutcheson.

[11] Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A. B. A. Jour. 425.

for the proposal for a specialized court grew out of a view that the regular courts had fallen into a habit of contracting the scope of judicial review on the facts, which the language of the Administrative Procedure Act in that regard was incapable of curing. Whatever force this view may have had appears to have been largely if not entirely eliminated by the recent decisions of the Supreme Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, and *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498.

5. It may be argued in favor of the proposal for a specialized court that there is an inconsistency in attempting to accomplish the orderly development of a statute by setting up a centralized administrative adjudicating tribunal (*e. g.,* the National Labor Relations Board) and then subjecting the decisions of such a tribunal to review by a diversity of courts (*e. g.,* in the case of the National Labor Relations Board, the eleven Courts of Appeals). Against this, it may be argued that diversity at the stage of judicial review, finally reconciled by the supervisory jurisdiction of the Supreme Court, leads finally to the best-considered result. We incline to the latter view. Perhaps if the former view appears in some particular instance to be of prevailing importance, exclusive review jurisdiction might be conferred on one of the existing regular courts;[12] though any proposal for such a step must always overcome the great disadvantage to the parties of requiring them to resort to a distant place.

6. There is no factual showing (in substantiation of an argument made in support of the McCarran Bill) that judicial review of administrative agency action imposes an undue burden on the existing Federal courts; and the Judicial Conference of the United States has said that it does not.[13] Published statistics with regard to cases in the District Courts and appeals from the District Courts to the Courts of Appeals do not furnish a sufficient basis for determining the numbers of such cases and appeals that would be within the terms of the McCarran Bill. Published statistics with regard to cases in the Courts of Appeals coming up directly from administrative agencies do tend to support the conclusion that there is no undue burden.[14] But the question is in any event not of first importance. If ever any of the existing courts appears to be overburdened, we think it clear (as will appear more fully from the following paragraph) that that situation can be better remedied by the appointment of additional judges to those courts than by the creation of a new court.

7. If a system of geographically decentralized reviewing courts is to be preserved, as we think essential, the personnel of a new specialized court, which would take over jurisdiction from the existing District

[12] See, *e. g.,* the exclusive jurisdiction of the Court of Appeals for the District of Columbia, under 47 U. S. C. A., § 402 (b), to review determinations of the Federal Communications Commission regarding construction permits for radio stations, radio station licenses and radio operators' licenses.

[13] See footnote 10, *supra.*

[14] Of the 2,830 appeals and original proceedings commenced in the Courts of Appeals during the fiscal year ended June 30, 1950, 485 (or approximately 17%) came up from administrative agencies; and of these 239 (or almost half) came from the Tax Court (Annual Report of the Director of the Administrative Office of the United States Courts for the fiscal year ended June 30, 1950, Table B3, pp. 132-134). It will be noted that the McCarran Bill excepts tax cases from the jurisdiction of the proposed Administrative Court (footnote 5, *supra*); and, since such cases involve no typical questions of administrative law, it may be supposed that they would be excepted from the jurisdiction of any specialized administrative court.

Courts as well as Courts of Appeals, would have to be large, whatever the number of cases within its jurisdiction. If, moreover, the number of judges provided were sufficient to take care of geographical decentralization,[15] it is likely that some of them at least would at times not have enough judicial business to keep them properly occupied, or else would waste time in travel that would better be devoted to judicial business. These, and the expense of duplicating physical quarters and clerical assistance, are aspects of the inefficiency and expense that must accompany fragmentation of the court system.

8. In our view the presently existing specialized courts (the Emergency Court of Appeals, the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals, and the Tax Court)[16] supply no valid argument for setting up a specialized administrative court of general jurisdiction. Each of the present specialized courts has its own special reason for being. Thus the Emergency Court of Appeals (made up, it is to be noted, of judges of the regular Federal courts) was set up in anticipation of a sudden flood of complicated litigation in the field of price and rent control and in view of the paramount importance in the existing emergency of achieving uniformity of decision as quickly as possible; and other specialized courts have been set up to deal with a very large volume of adjudication in a comparatively narrow field. In some instances they have worked out special procedures adapted to their particular fields, which would not be adapted to others. It is possible that other specialized courts of closely defined jurisdiction may be desirable at some time, for similar reasons, despite the strong arguments for a unified judicial system. But that possibility has in our view no bearing on the question before us, since we see no similar reasons for a specialized court of the kind with which we are concerned.

The arguments for a unified judicial system and against fragmentation seem to us to point conclusively to the undesirability of a specialized court of general jurisdiction for the judicial review of administrative agency action.

ROBERT M. BENJAMIN, Chairman

[15] We do not think that a system of hearings by commissioners, as provided for in the McCarran Bill, would be satisfactory in this field; and in any event it would not take care of decentralization at the appellate level.

[16] We pass the question whether the Customs Court (formerly the Board of General Appraisers) and the Tax Court (formerly the Board of Tax Appeals) are not in essence administrative agencies rather than courts.

## APPENDIX I

## HISTORY OF FEDERAL ADMINISTRATIVE COURT PROPOSALS IN THE AMERICAN BAR ASSOCIATION

The idea of a Federal administrative court had its inception, so far as official American Bar Association circles are concerned, almost simultaneously with the Association's first recognition of administrative law as a subject worthy of special attention. The Association's Special Committee on Administrative Law, consisting of five members headed by Louis G. Caldwell as chairman, was created in May, 1933 (58 A. B. A. Rep. 197). At the annual meeting of the Association in Grand Rapids that year the chairman of the Committee, in his oral presentation of the Committee report, stated that it was the view of the Committee that in order to curb the abuses arising out of the combination of prosecutor and judge in the same tribunal, either the judicial function should be segre-

gated from the executive and legislative functions and placed in an independent tribunal, or else the decisions of administrative officials should be subjected to complete review by such tribunal not only on the law but on the facts. He added:

> "The committee is not prepared to make a definite proposal as to the machinery for this. Personally, and I think this represents the present views of at least a majority of the committee, I incline toward the view that the ideal solution lies in the direction of a federal administrative court, with appropriate branches so as to take over or review the judicial functions of the multitudinous federal administrative tribunals. Such an institution will preserve the benefits and advantages ascribed to the administrative system. It will permit expeditious action by a tribunal which becomes expert and experienced in each specialized field. It might be equipped with examiners and either through them or by traveling on circuit have power to hold hearings anywhere in the country. Its decisions would be subject to one judicial review. Certainly this would be an excellent way to achieve uniformity out of the present chaos." (58 A. B. A. Rep. 203-204.)

In the written report of the Special Committee, presented at the 1933 meeting, reference was made to a bill introduced in the 73rd Congress by Senator Logan of Kentucky for the establishment of an administrative court of fifteen judges, consisting of one division for the hearing of cases and another division for the hearing of petitions for new trial. The Committee report stated that the bill contemplated that the new court would absorb the jurisdiction of the Court of Claims, the Court of Customs and Patent Appeals, the Circuit Courts of Appeals as to claims against the United States and as to appeals in tax matters, and the District Court of the District of Columbia as to extraordinary writs against officers of the federal government. The Committee did not comment on the merits of the bill but merely suggested that it be given study by the members of the Association (58 A. B. A. Rep. 407, 426-427).

In the following year, 1934, the Special Committee on Administrative Law, again headed by Mr. Caldwell, presented at the annual meeting in Milwaukee a report in which the establishment of an administrative court was definitely advocated. It was proposed that the court should consist of a sufficiently large number of judges to permit its organization into divisions for the hearing and decision of particular classes of administrative controversies, so that the advantage of trained personnel and experience in a particular field would be preserved. The court was to be ambulatory and was to have full power to adjudicate issues of fact as well as law, and its decisions were to be subject to judicial review to the fullest extent permitted by the Constitution. While the Committee did not state the scope of the proposed court's jurisdiction in any detail, it is evident from the context of the report that the court was intended to take over the socalled "judicial" functions that were being exercised by Federal administrative agencies, rather than to act as a tribunal for the review of decisions made by those agencies. The report concluded, as to this subject, with the following paragraph:

> "The committee recognizes that a federal administrative court represents an ideal rather than something capable of immediate practical realization in all its details. Some federal administrative tribunals are so firmly established and relatively free from cirticism (*e. g.*, the Interstate Commerce Commission) that it

may be unwise to transfer any of their functions until the proposed court has demonstrated its practicability by taking over and successfully exercising the judicial functions now exercised by other administrative tribunals which are neither so firmly established nor so free from criticism. In some instances it will prove desirable to retain the initial determination of an administrative controversy in a government department (*e. g.*, in the matter of tax refunds under the jurisdiction of the Commissioner of Internal Revenue), and to authorize the proposed court to review the determination on both law and facts, either on the record made or on trial *de novo* (*e. g.*, as does the Board of Tax Appeals). Consequently, the committee believes that a start should be made somewhat along the lines followed in the bill introduced by Senator Logan of Kentucky at the first session of the 73rd Congress, referred to in last year's report, but with certain modifications designed to make the court capable of receiving added jurisdiction from time to time over new fields of adminstrative controversy." (59 A. B. A. Rep. 539, 549-550.)

In 1935 the Special Committee on Administrative Law made no written report, but Mr. Caldwell as its chairman orally reported to the Los Angeles meeting of the Association that the Committee had decided to make a more modest start than its report for 1934 had envisaged, and that its plan now was to draft a bill which would set up a nucleus for an administrative court rather than a full-fledged court at the outset. Accordingly the Committee proposed a merger of four existing tribunals — the Court of Claims, the Board of Tax Appeals, the Customs Court and the Court of Customs and Patent Appeals—by transferring their thirty-five members to a single court whose jurisdiction, in addition to that already exercized by the four merged tribunals, would extend also to mandamus and injunction proceedings against Federal officials. The work of drafting such a bill, the chairman continued, had run into difficulties because of opposition from the specialized bars in the customs, tax and patent fields, and it was obvious that there would have to be many meetings and conferences before a satisfactory bill could be worked out (60 A.B.A. Rep. 136-139).

During the year 1936 the Special Committee on Administrative Law, under a new chairman, O. R. McGuire, went forward diligently with the administrative court proposal along the lines suggested at the 1935 meeting. The chairman explained and advocated the proposal at length in numerous articles and public addresses during that year.* The report presented by the Committee at the Boston meeting of the Association in August, 1936, contained a full history of the administrative court proposal up to that date and an elaborate presentation of arguments in favor of the proposal. The report stated that the bill sponsored by the Committee had been introduced in the Senate by Senator Logan in January, 1936, and in the House by Representative Celler in April, 1936. This bill provided for the creation of an administrative court consisting of a chief justice and not over forty associate justices, thirty-five of whom were

* See for example articles by O. R. McGuire in 22 A. B. A. Journal 197 (March 1936); in Cincinnati Law School Journal for January 1936; in George Washington Law Review for November 1936; in 22 A. B. A. Journal 853 (Dec. 1936); also article by Louis G. Caldwell in the Pennsylvania Law Review for June 1936 (84 Pa. Law Rev. 966). A lengthy article by Robert M. Cooper, special attorney in the Department of Justice, in opposition to the proposal appeared in the Michigan Law Review for December 1936 and January 1937 (35 Mich. Law Rev. 193, 565), and another article by the same author appeared in the A. B. A. Journal for March 1937 (23 A. B. A. Jour. 186).

to be transferred over from the existing Court of Claims, Court of Customs and Patent Appeals, Customs Court and Board of Tax Appeals. The new court was to be divided into a trial division and an appellate division. The trial division was to have the jurisdiction previously vested in the Court of Claims, the Customs Court and the Board of Tax Appeals, together with exclusive jurisdiction over actions for tax refunds and over the issuance of extraordinary writs against government officers and employees, also exclusive jurisdiction over the revocation or suspension of licenses, permits, registrations or other regulatory grants of all kinds. The appellate division of the court was to have jurisdiction to review decisions of the trial division on all questions of law and fact, subject only to further review by the Supreme Court of the United States upon certiorari.

The presentation of the Committee report at the Boston meeting provoked a lengthy discussion, and much opposition to the Logan Bill was manifested (61 A.B.A. Rep. 216-234). The upshot of the discussion was the adoption of a resolution in which the American Bar Association approved "in principle" the establishment of a federal administrative court, but referred back to the Special Committee on Administrative Law for further study and consideration the question of the composition, scope and jurisdiction of such a court (61 A.B.A. Rep. 233).

This action at the Boston meeting was taken by the Special Committee on Administrative Law as a virtual rejection of the administrative court proposal, and during the following year, 1937, under the continued chairmanship of Mr. McGuire, the Committee turned to other methods of improving the Federal administrative system. The report presented to the House of Delegates at its Kansas City meeting in September 1937 announced the abandonment of the administrative court idea because of the hostility shown by many members of the Association, particularly those engaged in tax, customs and patent pratice (62 A.B.A. Rep. 807). In its place, the committee came forward with a new proposal involving creation of intra-departmental boards to hear appeals from administrative officers, subject to judicial review by the Circuit Courts of Appeals. The House of Delegates discussed this proposal at great length at the Kansas City meeting and approved it as a declaration of principle, leaving to the Board of Governors the approval of the actual draft of the bill (62 A.B.A. Rep. 260-290).

Meanwhile Senator Logan in 1938 introduced a new bill to provide for a United States Court of Appeals for Administration (S. 367 75th Congress, 3rd Session), which approached the subject in a very different manner than the same Senator's bill of 1936. In place of creating a court of forty judges to serve as a substitute for various administrative tribunals, with an appelate division set up within the court itself to review the determination of its own trial division, the new bill proposed a court of eleven judges to act as the exclusive reviewing court for all or certain specified classes of determinations of sixteen enumerated administrative agencies or officers, namely, the Board of Tax Appeals, the Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the National Labor Relations Board, the Securities and Exchange Commission, the Post Office De-

partment, the Secretaries of Agriculture and Commerce in certain of their administrative functions, the Maritime Commission, the Commodities Exchange Commission, the Bituminous Coal Commission, the Processing Tax Board of Review, the Board of Governors of the Federal Reserve Bank, and the Federal Alcohol Administration. The review by the court was to be upon the record made before the administrative tribunal, but with power in the court to order the taking of new evidence before the administrative tribunal itself if a reasonable excuse was furnished for failure to adduce the evidence at the original hearing. The court was to apply the substantial evidence rule in its review of questions of fact. General sessions of the court were to be held in Washington, but divisions of the court might hold sessions anywhere in the United States. Its decisions were to be subject to further review by the Supreme Court of the United States upon certification of questions or certiorari.

The attitude of the American Bar Association's Special Committee on Administrative Law toward this 1938 proposal of Senator Logan was decidedly unfavorable. The chairman of the Committee in that year was former Dean Roscoe Pound of the Harvard Law School, and three of the four other members of the committee were new (the fourth being the former chairman, O. R. McGuire). Their report, presented at the Cleveland meeting of the Association in the summer of 1938, stated that the chairman and two other members of the committee had appeared at a Senate subcommittee hearing in opposition to the new Logan bill, and that the Committee was unanimous in its views thereon (63 A. B. A. Rep. 334). The reasons for the committee's opposition were stated in the report as follows (*ibid.*, p. 355):

> "(1) The bill goes in the direction of multiplication of tribunals. Legal history shows the general course of development to be a setting up of a multitude of specialized tribunals, and then a gradual consolidation of them into a simple unified system. In the beginnings of any new field of the law there is always pressure for specialized tribunals, and the pressure for a specialized administrative appellate tribunal seems exactly of this type. The right line of development is in a different direction. (2) The bill in effect provides for centralization of review of administrative action at Washington, the idea being apparently that in this way administrative law will have a uniform development. But there is nothing differentiating administrative law in this respect from the law at large. The same considerations which had led to a degree of decentralization in American administration of justice as compared with the English system apply here also. It is true the bill contemplates a certain peripatetic activity in the tribunal, but with a court of eleven and the extensive jurisdiction committed to it, this is hardly practicable. Moreover, if review of administrative action is to be centralized at Washington, expense to parties affected by rulings appealed from must not be overlooked. (4) It does not seem possible to set up a reviewing tribunal of experts and specialists such as the bill contemplates. There is too great a variety in the subjects committed to administrative agencies and hence to the proposed reviewing tribunal to make this feasible. (5) Review by an appellate tribunal requires a case in a condition to be reviewed, and there is no effective provision for a record. What is required is a record of the testimony and the evidentiary material and findings of fact based thereon so as to be the basis of legal conclusions. The mass of correspondence, memoranda, reports, rulings

and orders which is commonly presented by an administrative agency is no basis for any real review."

The 1938 Committee's opposition to the administrative court proposal was further emphasized by the Committee's strong advocacy of the proposal which had been approved in principle by the House of Delegates at the Kansas City meeting in 1937, for review of administrative determinations by intra-departmental boards, subject to appeal to the Circuit Courts of Appeals. A bill embodying this proposal was appended to the committee's report (63 A. B. A. Rep. 362) and was commented upon at some length in the report itself (*ibid.*, pp. 334-338). The House of Delegates, after discussion, voted to recommit the subject to the Special Committee for further study and redrafting the bill (*ibid.*, p. 331). The bill as redrafted by the Committee was brought before the mid-winter meeting of the House of Delegates in January, 1939, and was approved by the House (64 A. B. A. Rep. 517-518, 587). It was introduced in Congress and became known as the Logan-Walter Bill, and was passed by both houses of Congress in 1940, but was vetoed by President Roosevelt.

Thereafter the Special Committee on Administrative Law, under the chairmanship of Carl McFarland, started over again and eventually worked out the legislative proposal which became the Administrative Procedure Act of June 11, 1946. Nothing further was heard of an administrative court proposal in official circles of the American Bar Association until the Section of Administrative Law published its bulletin of February 23, 1949 (Vol. 1 #3) setting out a bill which Senator McCarran had introduced for the creation of an administrative court, together with the Senator's explanation of the bill as made on the floor of the Senate at the time of its introduction. Thereafter the subject was discussed in an article by Senator McCarran in the A. B. A. Journal for May 1949 (35 A. B. A. Jour. 379), followed by articles of Alfred J. Schweppe in opposition to the proposal (35 A. B. A. Jour. 533, July, 1949) and of Louis G. Caldwell in favor of the proposal (36 A. B. A. Jour. 13, January, 1950).

RALPH M. HOYT

## APPENDIX II

## ORGANIZATION AND JURISDICTION OF ADMINISTRATIVE COURTS IN CIVIL LAW COUNTRIES

It is well known that on the continent of Europe, particularly in France, Italy and Spain and to a more limited extent in Germany, and in Latin America administrative courts have been constituted with broad areas of jurisdiction and important powers over controversies between citizen and state.

These systems have been scrutinized by American legal scholars and have been carefully analyzed in law reviews and other publications.[1] A brief review of their prinicpal features will suffice to show that they afford no values not already available under our system of judicial review, but, on the contrary, they present personnel and jurisdictional problems that add to the difficulties without substantial compensatory advantage.

[1] For illustrative literature, see Borchard, *French Administrative Law* (1939), 18 Iowa Law Rev. 133; Riesenfeld, *The French System of Administrative Justice: A Model for American Law?* (1938), 18 Boston University Law Rev. 48, 400, 715; Uhlman and Rupp, *The German System of Administrative Courts* (1937), 31 Illinois Law Rev. 847, 1028; Rava, *Italian Administrative Courts Under Fascism* (1942), 40 Mich. Law Rev. 654.

In France, where we find the highest development of administrative jurisdiction, a body of administrative law and procedure—the *droit administratif*—has evolved as a separate part of the legal system, quite distinct from the ordinary civil law expounded by the *Cour de Cassation*. It is administrative rather than civil law that governs the rights of citizens who are aggrieved by official action. Controversies arising in such cases are tried in a system of special administrative courts—at the trial level, the *Conseils de Préfecture*, and on appeal, the *Conseil d'État*, the supreme appellate court for all administrative matters. Decisions of these tribunals are not subject to review by the ordinary civil courts. However, the existence side by side of two different systems of procedure creates need of a tribunal to resolve conflicts between the two. To resolve such conflicts there is a tribunal known as the *Tribunal des Conflits*. A serious objection to the system is the necessity of invoking this special tribunal to resolve conflicts. Indeed, this objection is inherent in any dual system of administration of justice.

Much that is good can be said of the *droit administratif*. The *Conseil d'État* has built up its own system of case law and it is a very remarkable system indeed. Common law critics have sometimes asserted that since the official in France is governed by a body of law separate from that which governs a private citizen, and especially since the law is applied by administrative courts, undue bureaucratic preferences are likely to develop. Quite the contrary, however, it is seemingly the fact that the law as developed by the *Conseil d'État* has been in many respects more successful in protecting the rights of citizens against illegal encroachment by administrative officials than has the Anglo-American common law which offers but a single legal system for all purposes. The *Conseil d'État* has, in fact, come to be regarded in France as the special guardian of the rights of the people and their bulwark of protection against a highly bureaucratic administration. It occupies a place in French popular esteem quite as high as that enjoyed by the Supreme Court in the United States among the American people.

In regard to cost, resort to the administrative courts in France is quite inexpensive, a quality unfortunately not possessed by judicial tribunals either in England or in the United States. In regard to scope of power of review of active administration, the *Conseil d'État* proceeds with discrimination in different areas of jurisdiction. In some types of cases full review is afforded (*contentieux de pleine juridiction*); in others, a limited review "on the law" only and not "on the merits" (*contentieux de l'annulation*), although socalled "recourse for exceeding the power" has in recent years penetrated more and more deeply into zones of questions of fact and even discretion. In these respects the situation is somewhat comparable with the practice in certain American states of varying the degrees of court review by prescribing different statutory review provisions in different areas of administrative action.

Parenthetically it is interesting to note how differently the doctrine of separation of powers, which came to us from the prerevolutionary political philosophy of France, has affected the growth of administrative law in the two countries. There the doctrine, under the stimulation of distrust of the civil courts, has produced a system characterized by practically a complete insulation of the administrative courts from

interference by the ordinary courts. With us, on the other hand, separation of powers, together with our due process clauses and under the stimulation of our general feeling of greater respect for courts than for administration, has been used as the theoretical argument in support of conferring upon the courts the power of review of administrative action. Far from producing a separation of areas of action the doctrine affords the judiciary a potent means of control over administration.

Without attempting even a brief examination of other systems, we may say, in general, that the civil law tendency has been in the direction of establishing specific administrative courts with plenary jurisdiction over controversies between citizens and active administration, in contrast with common law systems where, under the ever-present influence of the idea of "the rule of law," the citizens have turned to the ordinary courts for protection. The French *Conseil d'État,* being the oldest and most highly developed of the civil law administrative courts, is worthy of somewhat more extended examination in connection with the study of administrative law in the United States. Accordingly, there is set forth below a more complete statement of its organization and jurisdiction.

For present purposes it may suffice to observe that in any system, such as ours in the United States, where the courts are highly respected and potent, and where they are devoted to protecting private as well as public interests, it is difficult to envisage any substantial advantage to be obtained by creating a parallel jurisdiction for the handling of administrative controversies. Even if specialization may promote a measure of efficiency, and even assuming that a parallel tribunal could acquire in this country the high quality and prestige of the French *Conseil d'État,* there would nevertheless be the unescapable disadvantages of duplication of judicial personnel with its inevitable waste, and the host of procedural problems that are certain to arise from conflict of jurisdiction.

### *Organization and Jurisdiction of the Conseil d'Etat in France*

At present the *Conseil d'État* is composed of 42 State Councillors on ordinary service, 43 Masters of Request, 25 Auditors of the First Class and 15 Auditors of the Second Class—altogether some 125 members. The Minister of Justice is President of the *Conseil.* The *Conseil* has five sections only one of which is devoted to matters of litigation. This section forms the Supreme Administrative Tribunal. Other sections perform legislative as well as administrative functions. The *Conseil* thus set up has its origin in the Revolution but was reorganized and developed in its modern state by Act of 1872.

As regards functions, the *Conseil* exercises its judicial function in three different ways, (1) as a court of first instance in matters of common administrative law, (2) as a court of appeal, and (3) as a court of revision.

The specific jurisdiction of the *Conseil d'État* may be grouped under four subdivisions as follows:

(1) *Contentieux de la repression,* (suits for repression), a phase of jurisdiction involving penal cases of damage to public property.

(2) *Contentieux de l'interpretation,* (suits for interpretation), the business of interpreting administrative statutes and regulations.

(3) *Contentieux de l'annulation,* (suits for annulment). This is a very important branch of administrative jurisdiction. In cases in this category the *Conseil d'État* has authority and, indeed, exclusive jurisdiction, among other things, to cancel administrative regulations if found *ultra vires,—"recours pour exces de pouvoir."*

(4) *Contentieux de pleine juridiction,* (suits of full jurisdiction), damage suits against administration.

For purposes of study in connection with proposed administrative courts in the United States it is worthwhile to consider somewhat more carefully the third of the above categories, *i. e.,* the suit for annulment, and particularly *"recours pour exces de pouvoir."*

It is the jurisprudential creation of the Council of State, based originally on a law of 1790. Under it any administrative decision may be appealed to the *Conseil d'État,* and if the appeal is successful the decision will be annulled. The annullment is quite general and binds both the administration and the public. Decisions of the Civil Courts and acts of the Parliament are, generally speaking, the only acts of public authorities in France not subject to this phase of administrative court jurisdiction. The acts of the President of the Republic himself are placed under its control, the only exceptions being those which concern his relations with Parliament and those relative to his exercise of diplomatic power. An appeal to the *Conseil d'État* can be taken for a trifling cost by anyone with a special interest, however indirect. For example, a taxpayer's interest in seeing that the municipal council does not burden itself with an undertaking outside its legal competence is sufficient. The period of limitation within which the appeal must be taken, however, is very short—two months being the specified time.

There are two phases of the jurisdiction of the *Conseil d'État* with reference to *exces de pouvoir* that call for special attention. They are as follows:

(1) Abuse of power (*detournement de pouvoir*).

This is a type of jurisdiction which has been recognized by the *Conseil d'État* since the first decade of the second empire. It really consists of giving the phrase "exceeding the power" of the agency a very broad construction, far broader than *ultra vires* in common law countries. "Abuse of power" can be defined as the use of administrative authority for a purpose other than the purpose for which the law has conferred the power upon the agency—one not contemplated by the legislative authority setting up the agency. It is ground for annulment whether the activating purpose is good or bad. It is a form of *ultra vires* that bites deeply into administrative power, and particularly into discretionary power, because it results in a judicial inquiry into the purpose of the administrative act, and if that purpose is found to be outside the purpose intended by the statute it will be annulled, even though the act itself is within the literal terms of the grant of power. Mere consistency with the language of the parent statute is not enough. It, therefore, cuts much more deeply than *ultra vires* in the United States, where the court presumes that the official action is well founded in fact and will annul only if the aggrieved party proves arbitrary or capricious action.

To restate *detournement de pouvoir* more concretely, an administrative act will be annulled (a) when the determining motive in the mind of the administrative agency is

personal bias, prejudice, or favoritism (we in this country would do likewise), and also (b) even if the motive of the administration is a good one, if it does not conform with the actual purpose of the pertinent statutes. Such an act may have all the appearance of legality. The agency may have acted within its general area of competence, the legal forms may have been observed, the letter of the law may have been obeyed, but, nevertheless, the act is not legal because the official has used his powers to do something which was not contemplated under the legislative purpose of the law under which he has acted. He has not carried out the purpose of the parent law. He has pursued a wrong objective. Thanks to *detournement de pouvoir,* it is said, "the *Conseil d'État* keeps watch over administrative morality." This doctrine extends the control of the French administrative courts considerably further than United States courts have been accustomed to go under the doctrine of *ultra vires.*

(2) *Violation of the law.*

One other phase of the jurisdiction of the *Conseil d'État* under the heading of suits for annulment and particularly *recours pour exces de pouvoir* is of importance at the moment, *i. e.,* annulment for "violation of the law" or illegality. Not only must the administrative agency stay "within its jurisdiction" in the general sense to avoid the charge of *exces de pouvoir,* but also it must comply with the letter of the law in other respects. The term "violation of law" includes not only direct violation of the text of statutes, regulations, decrees, etc., but also the erroneous application or interpretation of these texts. It also includes the violation of general principles creating legal rights. One may even go further and speak of a "violation of law" when the law is applied under circumstances of fact which do not justify such application. It follows from all of this, that although the *Conseil d'État* is supposed to judge on the legality of the administrative act, nevertheless legality covers much ground, and the Court has the right even to examine the facts in so far as an examination and appreciation of facts appear indispensable to the discovery of illegality. Comparing this doctrine with corresponding recent American theories, it is clear that the French *Conseil d'État* will penetrate much further into the administrative decision and allow very much less to remain in the discretionary domain than do the Federal courts in the United States.

These grounds for challenge of administrative action before the *Conseil d'État* make that agency the unchallenged head of all French administrative authorities, and the *Conseil* has assumed that place in a big way. It freely annuls administrative decrees because it believes that no circumstances have been shown to bring the action within the purpose for which the power was conferred by the legislature. It freely reviews administrative interpretation and application of the laws. It should be made clear, however, that the *Conseil d'État* will not take the next and final step and substitute its judgment for that of administration on conflicting factual evidence. Furthermore, it will not supplement the discretionary act, although acting independently it might have decided otherwise. Nevertheless,it holds such a tight rein by virtue of its willingness to decide against administration for *exces de pouvoir, detournement de pouvoir* and *violation of the law,* that the field left for uncontrolled administrative discretion is decidedly limited. It is much more

circumscribed than is the case in England or the United States.

DEAN E. BLYTHE STASON.

### *Committee on Administrative Practitioners and Administrative Ethics*

For the past year, the work of this Committee has centered upon H. R. 3097, the Administrative Practitioners Bill. This Bill is the product of a great deal of constructive work and effort in past years by members of this Association. At the outset of this year, the Chairman of this Committee conferred with Congressman Walter, Chairman of the House Judiciary Committee, with a view to re-introduction of this Bill, which in the last Congress bore the number H. R. 8201. As a result, H. R. 3097 was introduced in the House on March 7, 1951.

H. R. 3097 fits the terminology and structure of the Administrative Procedure Act (§2), and §3 would confine all practice before administrative agencies to persons holding "Credentials". Credentials, in turn, may be obtained under Section 4 of the Bill by an Attorney upon proof that he is a member in good standing of a State, Territorial or Federal Bar, and his written statement that he is engaged in the practice of law, or proof of character and fitness. The advantage of the Bill for attorneys is that, once an attorney obtains Credentials, he would be permitted to practice before any and all agencies of the Federal Government, and would not have to go to the trouble of being admitted to practice before each one separately and on substantially the same showing. Credentials would be issued, under the Bill, by a committee of three members designated by the Attorney General, two to be officers serving in the Executive branch, and one attorney in private practice, representing the legal profession.

With regard to laymen, §5 of the Bill provides that any individual may be authorized by any agency to practice before it, so long as the agency finds that appropriate, is not otherwise precluded by law from so doing, and provides by published rules therefor. The issuance of Credentials to an "Agent" (which is the Bill's name for non-lawyers) lies within the discretion of each individual agency, and the section also provides that every agency shall issue or continue in effect Credentials to those individuals who, prior to enactment of the Bill, have been regularly authorized to practice before it and are in good standing before the agency.

Section 6 of the Bill provides that every agency may censure or suspend any person holding Credentials, and may subject any such person to proceedings for the revocation of Credentials. If the person holding Credentials is an Agent or non-lawyer, the agency may itself revoke the Credentials. If the individual is a lawyer, the agency may refer the matter to appropriate and existing State or Federal judicial disciplinary authorities, or itself issue an order revoking the Credentials, provided that that action is subject to judicial review.

Section 7 of the Bill provides criminal penalties for submitting false information or violating any provision of the Act.

The work of this Committee with respect to the Bill has met with very definite reaction by lawyers in various parts of the country, which may be summed up as follows:

1. That the Bill contains one definite advantage for the Bar in that it provides that a lawyer, by having to apply only once for Credentials, would then be entitled to practice before all administrative agencies

and so be relieved of the present inconvenience of having to go through the same procedure in order to be permitted to practice before each agency separately.

2. That there is a basic problem facing the legal profession, which is that laymen are now permitted to practice law before administrative agencies to the extent that they are permitted to act as trial counsel in adversary administrative proceedings. (See §§5, 7 and 8 of the Administrative Procedure Act, and *Morgan* v. *United States* (1938) 304 U. S. 1, 20.) The present Bill does not attempt to meet that problem, and it would tend to entrench laymen in that type of legal practice.

3. That the Bill should be amended so as to prohibit laymen from acting as trial counsel in adversary administrative proceedings, except that those laymen who are now earning their livelihood in that respect before particular agencies should not be deprived of it, but should be permitted to continue. Newcomers, however, should be definitely barred.

In its present form, the Bill is the result of a certain amount of negotiation with laymen's organizations, in that the provision to the effect that each agency may continue to admit to practice any individual, lawyer or non-lawyer, described above, was apparently agreed upon in different language in §6 of the Gwynne Bill, between representatives of the Association of Practitioners before the Interstate Commerce Commission and the Administrative Law Committee of this Association in the 1947-1948 Session of Congress. However, neither the Association of Interstate Commerce Commission Practitioners nor any other laymen group, so far as this Committee is aware, have given any support to the present Administrative Practitioners Bill, and at least one strong laymen's organization, composed of I. C. C. Practitioners, the Associated Traffic Clubs of America, vigorously opposes it.

The basic problem involved, whether laymen should be permitted to continue to act as trial counsel in adversary administrative proceedings, is one which is deep-seated and which has slowly been growing in importance as administrative agencies have multiplied in number and importance. For adversary administrative proceedings are something relatively new in our polity. Under our Constitution, cases and complaints which in 1776 were the subject of a suit at common law, in equity or admiralty, may not be withdrawn from judicial cognizance. See *Crowell* v. *Benson* (1932) 285 U. S. 22, 50, and *Murray* v. *Hoboken Land & Improvement Co.* (1856) 18 How. 272. But the determination of facts underlying legal rights which have been created by statute since 1776, need not be made in the judicial branch of the Government. While the bulk of such factual questions have been referred to the Judiciary by the United States Code, a large percentage of them have been referred to administrative agencies for determination, with judicial review on questions of law. See *Stark* v. *Wickard,* (1944) 321 U. S. 288.

The upshot of all this is that, while adversary proceedings trying out certain factual questions may be conducted by adminstrative agencies and Legislative Courts as well as by the Judiciary, adversary administrative proceedings are inherently comparable to judicial proceedings. The Supreme Court has specifically said so, and has laid down, as a matter of Constitutional interpretation, that adversary administrative proceedings are "*quasi-judicial*" in character, subject to

the Constitutional requirements of procedural due process; and that such proceedings must be conducted by administrative agencies "in accordance with the cherished judicial tradition embodying the basic concepts of fair play". *Morgan* v. *United States* (1938), 304 U. S. 1, 14, 15. In addition, Agency Rules of Practice follow faithfully the structure and provisions of Court rules.

There are, therefore, two types of administrative practice, (1) adversary proceedings, and (2) mere clerical or similar dealings with Government officials and administrative agencies. They are vastly different, and the latter do not substantially affect the legal profession.

Adversary administrative proceedings, however, require making choices between causes of action, and the preparation of pleadings. They require a perspective on all the available interim mechanics of litigation —motions, depositions, injunctions, etc. They involve the courtroom work of examining and cross-examining witnesses, asking questions which must fit the rules of evidence, to some extent at least, and proving documents, and they require the interpretation of documents and of Supreme Court and other judicial decisions, writing briefs, and otherwise arguing questions of law. All this is essentially the work of a trial lawyer: he must know procedure and view substantive law as a panorama. Indeed, a trial lawyer is usually a highly-skilled craftsman, truly representative of the learning, breadth, intellectual capacity, and artistry of the profession at its best. In England, the subject of skillfully-conducted litigation is so highly esteemed and considered so vital to the public welfare that only barristers, persons of great skill and experience who do little else but litigation, are permitted to appear as trial counsel in the Courts.

However, while laymen are now prohibited from acting as trial counsel in adversary judicial proceedings, owing to the fragmentary and largely-unperceived development of administrative law they have been permitted to act as trial counsel in adversary administrative proceedings. That is, a man whose previous occupation was that of public relations man, clerk, rate-specialist, accountant, or ordinary business, and on some showing which does not include legal training, suddenly becomes clothed with authority to select forms of action; to draft pleadings, take depositions, and urge motions; to examine and cross examine witnesses, to ask questions which must fit the rules of evidence to some extent, at least, and prove documents; and last, but not least, to write briefs, interpret writings and Supreme Court and other judicial decisions, and otherwise argue questions of law.

This is practicing law in its very essence. These laymen use legal libraries, do legal research, cite cases, write pleadings and briefs, try questions of fact, work up a legal vocabulary, argue legal principles, and present legal argument just as lawyers do in courts of law on similar subjects, and sometimes in the same cases.

Also, law is by its very nature a comprehensive subject, and the essence of a lawyer's training is to give him that well-rounded perspective from which he may perceive the legal significance, in perhaps a dozen different fields, of any single step taken. Not so, however, with a layman who may suddenly be clothed with authority to conduct an adversary administrative proceeding in a single field of substantive law. He lacks the training to perceive the far-

reaching ramifications which any single step may have in collateral fields of law, and the results may be disastrous. Indeed, there are a number of horrifying stories that lawyers hear informally, of blunders by laymen in some legal field connected with administrative practice.

It is therefore the view of this Committee that the subject of the extent to which laymen are now practicing law before administrative agencies should be posed before the meeting of the Association in September, with a view to re-evaluating the Administrative Practitioners Bill and, in particular, considering amending the same so as to include a prohibition against permitting laymen to act as trial counsel in adversary administrative proceedings, or in any event, with a view to formulating a clear-cut policy.

F. TROWBRIDGE VOM BAUR, Chairman

## ADMINISTRATIVE PROCEDURE ACT COMMITTEE

For the year 1950-51 the Administrative Procedure Act Committee was assigned the task of reviewing certain legislation before the Congress which affects the Administrative Procedure Act. In addition, the Committee was asked to make a study of the Act itself in order to determine whether any of the exemptions provided for therein should be continued or whether grounds existed for their repeal. In furtherance of this assignment the Committee has given consideration to a number of pending bills and has partially completed a study of the exemptions under the Act as now written. The following is a summary of the conclusions which have been reached as a result of this work.

### *Federal Civil Defense Act of 1950*

The Federal Civil Defense Act of 1950 (Pub. Law 920, 81st Cong.) as passed by the Congress, contained a §305 providing that all activities under the Act during a declared emergency, should be excluded from the operation of the Administrative Procedure Act (66 Stat. 237), except as to the requirements of §3 thereof. This exemption became the subject of vigorous objection by the Administrative Law Section and immediate efforts were begun to secure its repeal. It was soon apparent, however, that the issues involved extended beyond this particular bill to the entire scheme of federal emergency regulation. The Defense Production Act of 1950, the Renegotiation Act of 1951 and many others were found to contain similar exemptions. Those with experience under similar legislation during World War II pointed out that the war-time agencies could not have operated efficiently under the Procedure Act. On the other hand it was recognized that the indefinite duration of the present emergency raised serious questions as to the wisdom of permitting the new agencies to ignore the principles and safeguards established by the Act.

The opposition of this Committee to the broad type of exemption found in the Civil Defense Act was expressed on several occasions. The Committee recognizes, however, that certain phases of emergency regulation cannot be effectively carried out if strict compliance with the Administrative Procedure Act is required. The problem is obviously one that requires careful study and the Committee notes with approval that the Section has established a special committee charged with the study of the entire question.

*Riss & Co., Inc.* v. *United States* No. 479
April 16, 1951

In the above decision the Supreme Court reversed an unreported judgment of a special three judge U. S. District Court of the Western District of Missouri and held that the Administrative Procedure Act was applicable to a hearing before the Interstate Commerce Commission upon an application for a Certificate of Public Convenience and Necessity to extend operations as a common carrier by motor vehicle under the Interstate Commerce Act. The Supreme Court cited its earlier decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, which had held the Act applicable to deportation proceedings. After this decision it was rumored that the ICC would seek a broad legislative exemption of all proceedings involving Certificates of Public Convenience and Necessity. Mr. Cragun, Chairman of the National Committee alerted the various interested members of Congress to this possibility and advised them of the Section's objection to any exemption of the ICC. Subsequently it was reported that the ICC was proceeding with the appointment of hearing examiners as required by the Administrative Procedure Act indicating that it may accept the Supreme Court's ruling and not endeavor to secure statutory exemption. The Committee wishes to express its approval of the action which was taken to forestall legislative exemption of the ICC.

***House Bill H. R. 405***

This bill makes it unlawful for any person who is or has been a member, officer, attorney or employee of a governmental agency to accept employment from any person subject to or dealing with such agency. It also prohibits any person from employing present or former personnel of a governmental agency. However, the bill does not apply to (1) former governmental personnel who have not been employed by a governmental agency within the two preceding years, (2) former governmental personnel who had no duties or responsibilities with respect to matters relating to the employer, and (3) governmental personnel returning to employment with former employers. Violation of the bill would be punishable by a fine of not more than $5,000 or imprisonment of not more than two years, or both. The bill takes the form of an amendment to the Administrative Procedure Act.

A similar bill was introduced in the last session of Congress. The present bill has been referred to a subcommittee of the House Judiciary Committee which subcommittee is headed by Representative Walter. The earlier bill was referred to various governmental agencies for their comments and replies are now being received by the subcommittee. No hearings have been held on either of the bills. The suggestion that former governmental personnel should be prohibited for some specified period from dealing in any manner with the agency by which they were employed is not a new one. It is based upon a recognition that the value of a former governmental employee to a private employer often arises from his acquaintance within a governmental agency rather than from his knowledge of any particular matter upon which he may be engaged. Recent Congressional investigations indicate a need for some control in their field. However, the danger that a prohibition of this type may prevent capable personnel from accepting employment with a governmental agency must be recognized.

The Committee believes that additional study of the problem is required. It further believes that the bill is not within the scope

of the Procedure Act and should never be adopted as an amendment to that Act. The Act should not be used as a vehicle for every bill that generally concerns the Administrative Law field. For this reason the Committee recommends that the bill in its present form be opposed by the Section.

***Senate Bill S. 903***

This bill is similar to S. 1982 which was introduced into the last session of Congress. The Bill purports to make the provisions of the Administrative Procedure Act applicable to certain hearings of the Post Office Department, particularly fraud orders, where the Postmaster General decides that a hearing is consistent with the purposes of the Section involved. S. 1982 was reviewed by this committee last year and at that time was reported as being a devious attempt to avoid the provisions of the Administrative Procedure Act. There is no reason, in view of the *Wong Yang Sung* case and the *Riss* case, to believe that the Post Office Department is not already subject to the Administrative Procedure Act in its entirety. In 1950 this Committee recommended that the Section oppose S. 1982 and at the Annual Meeting of the Section a resolution to that effect was approved. The Committee recommends that the Section re-affirm its opposition to S. 903.

***House Bill H. R. 1376***

This bill is a copy of House Bill H. R. 7301 which was introduced into Congress in the last session. It provides for amendment of §10 (d) of the Administrative Procedure Act and extends the provisions providing for interim relief pending judicial review of agency action. The Act would add the following language at the end of the present §10 (d):

> "(whether or not review proceedings have begun); in the case of agency action which is not final, a court which would have jurisdiction to review such action if it were final shall be considered a reviewing court for the purposes of this sentence".

As indicated in the Report of the Committee for 1950 there would appear to be no imperative necessity for this legislation and although the Committee can see no serious objection to the change, it does not recommend that any formal action be taken by the Section with regard to it.

***Senate Bill S. 658***

This bill is substantially the same as Senate Bill S. 1973 which was introduced into the last session of Congress. It provides for further amendments to the Communications Act of 1934 as amended, and as noted in the Report of this Committee in 1950 it makes certain additions to the requirements of the Administrative Procedure Act. The bill in no way violates the provisions of the Administrative Procedure Act but merely expands them for purposes of greater clarity or additional safeguard. Since affirmative support for this bill is of chief interest to the F. C. C. Bar, the Committee does not feel that any action need be taken at this time by this Section.

***House Bill H. R. 2816 and Senate Bill S. 716***

Both of the above bills deal extensively with the Bureau of Immigration and Naturalization. They are of interest to the Section because both endeavor to exempt that Bureau from the requirements of the Administrative Procedure Act. In so doing, the bills would re-affirm the results achieved by the Supplemental Appropriation Act of 1950 c. 1052, 81st Cong., Second Sess. The provisions are also substantially similar to

House Bill H. R. 10 which was reviewed last year by this Committee. The Section has already placed itself on record on several occasions as opposing the exemption of the Bureau of Immigration and Naturalization from the Procedure Act and the Committee believes that this opposition should be continued.

***Existing Exemptions from the Terms of the Administrative Procedure Act***

At the request of the Chairman of the Administrative Law Section, this committee began a study of the "exemptions" to the Administrative Procedure Act which are contained in the Act itself. The Committee found that most of the specific exemptions contained in the Act covered situations where it would be impractical or inadvisable to apply the principles of the Act. For example, the exemption of functions of the United States requiring secrecy in the public interest, matters relating solely to the internal management of an agency, courts martial and military commissions, and military, naval and foreign affairs functions of the United States appear to be in this category. However, a detailed analysis was begun on four exemptions which at first glance could not be so justified.

The first exemption studied was that provided by §2 (a) (4) which excludes from operation of the Act (except §3 thereof)

> "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Housing and Rent Act of 1947, as amended; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947; and the Veterans' Emergency Housing Act of 1946."

At the time the Administrative Procedure Act was passed these war functions were exempted primarily because the agencies were expected to cease operation before any adequate procedures in compliance with the Act could be established and because most of the functions were not required to be exercised upon statutory hearings. Unfortunately the functions exempted have not diminished as originally anticipated. As noted earlier, the current emergency has produced a large number of bills of a similar nature which provide for exemption from the Act. In place of those originally set forth in §2 (a) (4) of the Act, the following imposing list of statutes now contain specific exemptions: (1) Universal Military Training and Service Act, (2) Contract Settlement Act of 1944, (3) Surplus Property Act, of 1944, (4) First Supplemental Appropriation Act of 1947, §302, (5) Social Security Act Amendments of 1946, §601, (6) Sugar Control Extension Act of 1947, §6 (a), (7) Housing and Rent Act of 1947, §210, (8) Housing and Rent Act of 1948, §301, (9) Second Decontrol Act of 1947, §5, (10) Export Control Act of 1949, §7, (11) International Wheat Agreement Act of 1949, §3 (i), (12) Defense Production Act of 1950, §709, (13) Supplemental Appropriation Act of 1951, (paragraph headed "General Provisions—Department of Justice", Ch. III.) and (14) Federal Civil Defense Act of 1950, §305.

As previously noted, the Section has appointed a special committee to look into the procedures of various emergency agencies of the Federal Government and after this Committee has completed its studies a more intelligent approach to this problem will be possible. It is sufficient for this Committee to point out that procedures should be estab-

lished for these agencies to insure that they will deal fairly with the citizens. The Committee also suggests that the Section establish some effective means of preventing, if possible, future unnecessary exemptions from the Act before they are enacted.

The second exemption studied was that contained in part 2 of the opening paragraph of §4, concerning matters related to agency management or personnel or public property, loans, grants, benefits or contracts. This exemption concerns the proprietary activities of the Government in situations where the Government is at least to an extent, in the same position as the individual citizens. The Senate Committee Report of 1945 indicated that since the principal consideration in this field related to mechanics and interpretations of policy, the elimination of mandatory procedural requirements would tend to encourage and facilitate the issuance of rules. However, within the scope of this exemption further study might well be made of certain peculiar circumstances which do arise. For example, in the loyalty review program there may well be a field for special legislation to protect the individuals who are employed by government agencies from arbitrary proceedings and dismissals. Also in situations where the Government assumes control over basic materials which are in short supply, some special controls might be wise to insure fair dealing by the Government with representatives of industry who must then look to the Government for their supply of needed material. However, as a general proposition the Committee feels that this exemption is a proper one.

So far as the exemptions contained in the opening paragraph of §5 are concerned, the Committee has not had an opportunity to complete its studies and therefore, will make no recommendations regarding those exemptions at this time.

The fourth exemption reviewed was that provided by the last sentence of §5 (c) which excludes from the "Separation of Function" requirements "applications for initial licenses or proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency." The Committee is of the opinion that the exemption as written is appropriate and covers a situation in which the procedures of the Act would not be readily applicable. The determination of applications for initial licenses was originally exempted from the Act because it was felt that the determination of such matters was much like rule making and hence the parties would be better served if the proposed decision, required by §8, reflected the views of the responsible officers in the agency whether or not they had actually taken the evidence. In addition, it was felt that the granting of a license was a vital part of the establishment of future policies and that, therefore, decisions concerning their issuance should be determined by the agency and its responsible head without the restrictions of the "Separation of Functions" doctrine. As to the exemption concerning the validity or application of rates, facilities or practices of public utilities or carriers, it was felt that since these cases are customarily consolidated with rule making proceedings where a separation of functions is not required, the failure to exempt these proceedings would either unduly restrict rule making or prevent consolidation of such proceedings. The proceedings

generally are complex and require consultation and advice between experts and the agency heads or hearing examiners, and the exemption was undoubtedly provided on the theory that the separation of functions in such cases would be detrimental to the intelligent disposition of the questions.

As previously indicated, the Committee has not completed its studies of all of the exemptions under the Act. However, it can be concluded from the study that has been made to date that for the most part, the exemptions are based on logical and realistic conclusions regarding the proper application of the Administrative Procedure Act and that with the possible exception of those found in §2 (a) (4) the reasons for the exemptions still exist.

ROBERT H. YOUNG, Chairman

## COMMITTEE ON ADMINISTRATIVE RULES AND RULE-MAKING

### *Abuse in Rule-Making Under the Administrative Procedure Act*

The Committee on Administrative Rules and Rule-Making has been interested in a study of alleged procedural delays and confusion in rule-making proceedings, particularly in those cases where the Administrative Procedure Act is used as an excuse or an alleged justification for unwarranted action. While it is recognized that some "delay" may be an essential element in the orderly and democratic processes in some proceedings, we have been concerned with complaints of "unduly long and expensive" proceedings, to which reference has been made by the Judicial Conference.

Subsequent to the committee's selection of this project for inquiry and report, the subject was incorporated in a broad study which has been undertaken by the Advisory Committee of the Judicial Conference. It is assumed that the Section of Administrative Law will have an opportunity to consider any recommendations of the Advisory Committee (and, we hope, to participate in the study), since the Judicial Conference's inquiry concerns questions of substantial interest to the bar.

It appears desirable to point-up some of the alleged abuses in rule-making proceedings which justify further study if the Administrative Procedure Act is to escape unjustifiable criticism, to hold the confidence of the public, and to be used as an effective and efficient instrument in the administration of justice through the administrative process. The committee has observed a number of situations suggesting an abuse in administrative rule-making, which may be summarized as follows:

1. Businessmen are heard to complain that counsel representing interested persons at a rule-making proceeding can "certainly confuse and delay the hearing," and they congratulate themselves in having similar proceedings in another area conducted without the use of counsel.

2. It is reported by persons interested in a proposed rule upon which a hearing has been scheduled that the agency has suggested that such persons prepare for and participate in such hearing without counsel, in the interest of a more orderly proceeding; and such persons have been informed that their testimony "would be considered as much if not better" than if they had counsel.

3. Persons who are interested in the proposed rule are required to be in attendance at a hearing for many weeks when the subject could have been properly and adequately covered in one week (or two weeks at the

outside), and the delay and unnecessary expense are attributed to the requirements of the Administrative Procedure Act.

4. It is necessary to unduly continue a hearing on a proposed rule in order to secure unnecessary oral testimony, *e.g.*, that the population in a summer resort area is larger in the summer than in the winter; and it is alleged that such strict proof, which is adduced from a witness who must be called from the resort area, 50 miles away, is required under the Administrative Procedure Act.

5. Counsel in rule-making proceedings refuse to take advantage of the right to have expert witnesses present evidence from prepared statements, but use the question and answer method on technical points (even though it requires counsel to read a written question and the witness to read the answer from a prepared statement), which unduly delays the hearing, increases the volume of record, results in unnecessary costs and expenses, and hinders a judicious review of the record since it makes for confusion and the necessity for subsequent clarification and resulting duplication.

6. Thousands of pages of record are developed over many months to establish a standard; counsel have a "field day" acting under the right of "cross-examination" in a rule-making proceeding; and questions are raised as to whether such "unduly long and expensive" proceedings may be caused by:

"(1) Inadequate preparation by counsel.

"(2) Inexperience or ineptness of counsel.

"(3) Dilatory, uncooperative or obstructive tactics of counsel."

7. The rule-making agency lays down unreasonable rules for the introduction of official documents or establishes a standard for "official notice" which tends to defeat the objectives thereof, and this is done under the alleged "direction" or "requirements" of the Administrative Procedure Act.

8. The presiding officer in a rule-making proceeding encourages the idea that all of the testimony of a voluntary witness on a technical matter may be struck from the record, if the witness (either because of not being prepared or for any other reason) declines to answer a question on a phase of the subject which was not included in the witness' direct statement, and, in further confusion of the proceeding, the presiding officer permits cross-examination to the point where witnesses are reluctant to appear (and there is no authority for subpoena).

9. Days are spent in a rule-making proceeding in the introduction, through the usual question and answer method, of technical documentary evidence, without any consideration given to the adoption of some of the judicial short-cuts, such as the prehearing procedure, and other practices which will expedite the proceeding.

10. Lawyers and their clients find themselves embroiled in rule-making proceedings which are not conducted with the dispatch or spirit involved in legal proceedings, and the Administrative Procedure Act is cited as the reason for delays of the type eliminated in the courts through the adoption of the Federal Rules of Civil Procedure.

***Conclusion***

It is the recommendation of the active members of the Committee on Administrative Rules and Rule-Making that a thorough study be made of alleged abuses in rule-making proceedings; and, if the abuses are substantiated, that prompt action be taken by the Section of Administrative Law to discourage or, where possible or feasible, to

prevent the continuation of any such abuses. Donald R. Heggy, chairman.

## COMMITTEE ON EMERGENCY AGENCIES

The objectives of the Committee, stated broadly, are to study the procedures adopted by the emergency agencies which are established to administer the defense mobilization program, and to note any procedures or practices which do not accord essential fairness to persons whose rights are affected by the actions of such agencies. Where such procedures or practices are observed by the Committee, the Committee will endeavor to have such procedures or practices reviewed for the purpose of eliminating the unfairness or inequities. These agencies are exempt in their operations from the provisions of the Federal Administrative Procedure Act. However, one of the objectives of the Committee is to secure, wherever possible, observance by the agencies of the spirit of the Administrative Procedure Act in the promulgation of their procedural regulations and in the application and enforcement of such regulations.

As soon as the Committee had organized and familiarized itself with the scope of its work, it was thought desirable to inform the various Departments and Agencies entrusted with responsibilities under the defense program of the existence of the Committee and its purposes. Accordingly, a letter was sent to three departments and seven agencies which are charged with important responsibilities under the defense program.

Such a letter was also sent to the Director of the Economic Stabilization Agency, the Director of the Office of Price Stabilization, the Chairman of the Wage Stabilization Board, the Administrator of the Defense Production Administration, the Acting Administrator of the National Production Authority, the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce.

In due course, replies were received from the recipients of all of the letters. The general tenor of all of the replies was an expression of agreement with the objectives of our Committee and of willingness to cooperate. Several of the letters outlined in more or less detail what the agency was already doing to assure fair procedures. Several of the letters also invited our suggestions.

Subsequently, the Committee prepared an announcement concerning its objectives and the names of its members. This announcement was prepared primarily to advise the members of the Bar of the existence of the Committee. The announcement has been published in the American Bar Association Journal, The Bulletin of the Administrative Law Section, the Journal of the Bar Association of the District of Columbia, the District of Columbia Young Lawyer, and the Federal Bar Journal.

The Committee has, from time to time, considered various legislative proposals affecting the field of the Committee's operations.

The Committee also has studied the procedural regulations of those agencies which have issued them, and has kept itself informed on any amendments. Particular attention was given to Price Procedural Regulation No. 1 issued by the Economic Stabilization Agency. The question has been raised by the Chairman of the Section of Administrative Law as to whether an amendment to the Defense Production Act of 1950

should be sought to require that hearings on protests under §§ 407 and 408 of the Act should be conducted in conformity with the provisions of §§ 7 and 8 of the Administrative Procedure Act. The Committee considered the matter and concluded that it would not be advisable to seek amendment of the Defense Production Act so as to require that hearings on protests be conducted in conformity with §§ 7 and 8 of the Administrative Procedure Act. The reasons for reaching this conclusion are set forth in the following extract from a memorandum by Messrs. David Reich and Dean Dinwoodey of the Committee:

"1. It would not be advisable to seek amendment of the Defense Production Act so as to require that OPS hearings on protests be conducted in conformity with §§ 7 and 8 of the Administrative Procedure Act.

"In enactment of the Administrative Procedure Act, the earlier Office of Price Administration and other war agencies were specifically exempted from its provisions, except as to the requirements of §3; in view of that legislative history, any efforts to seek legislation making provisions of the Administrative Procedure Act applicable to OPS or any other emergency defense agency would very likely be fruitless.

"Any enactment that the OPS procedure be subject to §§ 7 and 8 of the Administrative Procedure Act might not in itself be effective to achieve the result of an opportunity for rebuttal and cross-examination by a protestant. These sections are supplementary to the rule-making provisions of § 4 and the adjudicatory requirements of § 5; the regulations of OPS are an exercise of the rule-making function; under § 4(b), the requirements of §§ 7 and 8 are applicable to rule-making only where the rules are required by statute to be made on the record after opportunity for an agency hearing; and there is no such clear statutory requirement in the Defense Production Act. The enactment of such a requirement might seriously impede the effort to stem inflation.

"2. The provisions of the Defense Production Act pertaining to OPS procedure, and the implementation of these provisions by OPS Price Procedural Regulation 1, appear now to provide for all the elements of a fair hearing practicable in the circumstances which would be accorded by application of §§ 7 and 8 of the Administrative Procedure Act to OPS procedure, with possibly one relevant exception, stated below. It is to be noted that among all the emergency defense agencies, OPS has the most definitive and liberal procedure. Also, there appears to be a sincere disposition on the part of OPS legal officers to accord protestants every opportunity to make a case before the agency and in the record for any appeal to the Emergency Court of Appeals.

"3. It is believed that the primary suggestion relates to the opportunity for the protestant to rebut economic and other data put into evidence by the Administrator or of which he may take official notice. It is now provided by Price Procedural Regulation 1 that:

" '* * * the Administrator shall include in the record of the proceedings on the protest such evidence, in the form of affidavits or otherwise, as he deems appropriate in support of the provisions against which the protest is filed. When such evidence is incorporated into the record, and is not so incorporated at a hearing of oral testimony, copies thereof shall be served upon the protestant, and the protestant will be given a reasonable opportunity to present evidence in rebuttal thereof.' (§ 300.37)

" 'In the event that the Administrator denies any protest in whole or in part, a copy of the Administrator's opinion shall be sent to the protestant by registered mail. In such opinion the protestant shall be informed of any economic data or other facts of which the Administrator has taken official notice, the grounds upon which decision is based * * *' (§ 300.49)

" 'The record of the proceedings may also include statements of economic data and other facts of which the Administrator has taken official notice under Section 407(b) of the Act, including facts found by him as a result of reports filed and studies and investigations made pursuant to Section 705 of the Act.' (§300.31 (b))

"The Regulation thus specifically provides for an opportunity to the protestant to have notice of and rebut documentary economic or other data incorporated into the record by the Administrator. But there are no specific provisions for rebuttal by the protestant of economic or other data of which the Administrator first takes official notice by reference thereto in his opinion denying the protest and not previously through incorporation of the data into the record. There are no provisions in the Regulation for reconsideration of the Administrator's decision.

"In § 7(d) of the Administrative Procedure Act, it is provided:

> 'When any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.'

"It would be desirable that the Regulation contain a specific provision incorporating the substance of this provision of § 7(d) of the Administrative Procedure Act. Conversation with a member of OPS legal counsel leads to the belief that such a recommendation by the Committee would be favorably received."

The Economic Stabilization Administrator also issued Wage Procedural Regulation No. 1 on December 27, 1950, but this regulation was subsequently revoked. At present there is no outstanding procedural regulation governing wage regulation.

The Committee also has under consideration the procedural regulation issued by the National Production Authority and is preparing criticisms of certain phases of this regulation for submission to the Authority with recommendations for changes.

The Committee is also giving consideration to the procedure for issuing certificates of necessity for amortization of emergency facilities under § 124A of the Internal Revenue Code, with a view to possible recommendations for changes in the procedure, and particularly in the form of application. This study has not yet been concluded.

Finally, the Committee at the present time (July 2, 1951) is considering drafts of a proposed letter to all of the Departments and Agencies previously mentioned which will suggest certain governing principles which the Committee believes should apply to all procedural regulations.

It is believed that the work of this Committee will grow in importance and volume as the economy of the country becomes further geared up to adequate production for national defense. Increased and stricter controls are probably inevitable and with them will arise new problems affecting the basic fairness of administrative procedures.

WENDELL BERGE, chairman.

## COMMITTEE ON CONTRACTS OF LAWYERS WITH INDIAN TRIBES

On November 9, 1950, a few months after Mr. Dillon Myer became Commissioner of the Bureau of Indian Affairs, United States Department of Interior, he released a memorandum setting forth the policies of the Bureau with regard to the approval of claim contracts between attorneys and Indian tribes. Among the policies, which he stated would guide the Bureau in approving claim contracts, were the following:

(a) that all fees should be contingent.

(b) that the contingent fee should be set as a maximum percentage rather than straight percentage—the exact percentage to be fixed by the Commissioner after the work was completed.

(c) that reimbursement of expenses should be wholly from amounts recovered rather than from available tribal funds.

(d) that the work of the attorney for the tribe should be supervised and directed by the Bureau.

(e) that progress reports or other reports should be required of attorneys for the information of the Bureau.

(f) that association of attorneys and assignment of interest in a contract, and obligations to perform work, should be subject to the approval of the Bureau or Department.

(g) that a contract to be held and performed by a firm should disclose the division of fees and responsibility among the partners.

(h) that the contracts should be for a term not to exceed ten years, with renewals for 2 year periods permitted under certain conditions.

(i) that the contract should be terminable by the Commissioner or Secretary of Interior on sixty days' notice with or without cause.

The American Bar Association received many complaints directed against these announced policies from its members, charging that they contravened the canons of ethics of the American Bar Association, were of questionable statutory authority, and were unfair to Indian tribes and attorneys alike. The Section of Administrative Law of the Association thereupon appointed this committee and authorized it to study these policies and make recommendations for changes.

The committee had a number of meetings in order to study the foregoing policies and the complaints leveled at them, including complaints which were submitted directly to the committee by several attorneys. To secure the cooperation of the Department of the Interior in obtaining information, the Committee then addressed a letter to Secretary of Interior Chapman reading as follows:

"The Administrative Law Section of the American Bar Association has appointed a committee of five member lawyers to study the policies and practices of the Bureau of Indian Affairs of the Department of Interior in connection with the approval of attorney contracts with Indian tribes, and to prepare a report thereon for the information of the members of the Association. Such study and report will include a review of the provisions of a 9-page memorandum dated November 9, 1950, addressed to the bureau officials and tribal officials and signed by Commissioner Dillon Myer.

"The members of the committee are: (naming them).

"This committee was appointed in response to numerous complaints from Association members that the Bureau of Indian Affairs was unreasonably interfering in the choice of attorneys by Indian tribes. It has been charged that these policies in many respects contravene the canons of ethics of the American Bar Association, are of questionable statutory authority, and are unfair to Indian tribes and attorneys alike.

"It is the intention of the committee to make a careful study of the policies and practices of the Bureau in approving contracts for Indian tribes as well as the reasons which gave rise to such policies, before attempting to evaluate any complaints which have been made. The committee would very much appreciate the cooperation of the Department and the Bureau of Indian Affairs

in making this study. It should like to obtain any information which would be helpful in gaining an understanding of the problems which are involved in connection with the approval of contracts of lawyers with Indian tribes. Would you please advise us as to whom we may contact in the Department for the purpose of obtaining pertinent information."

In reply to such letter Secretary Chapman stated:

"This responds to your letter of March 26 relating to the study to be made by your committee for the Administrative Law Section of the American Bar Association of the policies and practices of the Bureau of Indian Affairs in reviewing contracts between attorneys and Indian tribes.

"The statement of policy on this subject issued by the Commissioner of Indian Affairs on November 9, 1950, was intended to be provisional, and the problems involved in reviewing contracts between attorneys and Indian tribes are being restudied in connection with the promulgation of new regulations in this field. The Department welcomes the study to be made by your committee, and stands ready to afford the committee every assistance in the making of the study.

"The Commissioner of Indian Affairs, as well as the office of the Solicitor, will be glad to supply all pertinent information to your committee. The person in the office of the Solicitor whom you should contact is Mr. W. H. Flanery, who is Chief of the Indian Division of that office."

The committee thereafter conferred with Mr. W. H. Flanery, and received two lengthy statements from Commissioner Myer relating to this whole matter. As a result of the conference with Mr. Flanery, the Interior Department agreed to prepare a new set of regulations relating to employment of attorneys by Indian tribes, which are to be published in the Federal Register and made the subject of a hearing, at which the committee and all interested persons will be given an opportunity to be heard before the regulations become effective. The Department also has advised the committee that it will be happy to receive suggestions as to what the new proposed regulations should embody. The committee intends to submit such suggestions.

In conclusion, the committee has thus far succeeded in obtaining a complete restudy by the Interior Department of the policies to govern the approval of attorney contracts with Indian tribes, and is making preparation to participate in the hearing on the new regulations. The committee will be happy to receive comments and suggestions from any attorney interested in the problem as to the position to be taken by this committee in such hearings.

RUFUS G. POOLE, chairman

## COMMITTEE ON STATE ADMINISTRATIVE LAW

The first reaction after appointment as chairman was as to the size of the committee, 48 members, one for each state. All contacts had to be by letter writing, and this mostly of an impersonal character. To keep the committee fully represented by an active member in each state, to keep the complement live and up-to-date, has required considerable administrative detail work both on the part of the chairman of the committee and the chairman of the Section. The choice of members of the committee is limited to members of the Section. Personal meetings, consultation and advice were not possible.

As an expedient, and acting upon the suggestion of Chairman Hall, a small advisory committee was formed consisting of the fol-

lowing: Harvey Hoshour, Albuquerque, New Mexico; Robert L. Howard, Columbia, Mo.; J. H. Goetz, New York City; Ralph N. Kleps, Sacramento, Calif.; Nathaniel L. Nathanson, Chicago; W. E. Treadway, Topeka, Kan.

Although it has not been found practicable for even this small group to get together for personal consultation, the members of this advisory committee have been most helpful.

Since the duties, functions, and proper activities of the committee had not been spelled out in formal detail, it became necessary to ascertain these from previous practice and tradition. First, it was concluded that it was not our function as a national committee to promote or initiate any state legislation. That should be left to the state and local bar associations and their committees. But it should be our duty to assist, advise and encourage all effort to improve administrative status in every way possible. Second, we should endeavor to carry out the spirit and plan of coordination between the American Bar Association and the state bar associations. And finally, that we should engage in some worth-while study and investigate some feature of administrative law.

In accordance with the above ideas and with the approval of the advisory committee, a letter was prepared and sent to each member of the committee.

The feature of administrative law chosen for study was that of Rules and Rule-Making by administrative agencies in the various states. In the January, 1948 number of the *Iowa Law Review* appeared an article by Professor Nathanson on the subject of "Recent State Administrative Procedure Legislation." This dealt, among other things, in comprehensive fashion with the subject of "Filing and Publication of Rules" and "Procedure in Rule-Making." It was thought by us that an effort to find out what advancements, if any, had been made along those lines in the several states might prove worthwhile. So a questionnaire was prepared and included in the letter, and the members were requested to ascertain and report for each state:

a. Whether there were any rules for the filing or publishing of administrative rules and regulations.

b. If so, had they proved successful and helpful; and

c. If not, the reason for failure.

The response to the questionnaire has been quite complete and satisfactory. A brief summary of the replies to the questionnaire, prepared by Professor Nathanson, is appended hereto.

Special interest in the subject of Administrative Law and Procedure has been noteworthy in the following states and localities: (Following the name of the place is the name of our committeeman or other lawyer who has been influential in furthering the work and arousing the interest.)

Idaho, Laurel E. Elam, Boise; Alabama, Wm. Logan Martin, Birmingham; Kansas, W. E. Treadway, Topeka; District of Columbia, William B. Jones, Washington; Illinois, Nathaniel L. Nathanson, Chicago; Iowa, J. C. Pryor, Burlington; Maryland, G. Kenneth Reiblich, Baltimore; Massachusetts, Robert M. Segal, Boston; Minnesota, Robert M. Bowen, Minneapolis; Missouri, Robert L. Howard, Columbia; Nevada, W. Howard Gray, Ely; New Jersey, Nathan L. Jacobs, Newark; Oklahoma, Paul Harkey, Idabel; Pennsylvania, Harrington Adams, Harrisburg; Ohio, J. Roth Crabbe, Columbus; Rhode Island, Horace L. Weller, Providence; South Carolina, David W. Robinson,

Columbia; Virginia, F. M. Rivinus, Roanoke; West Virginia, Robert S. Spilman, Charleston; California, Frank C. Newman, Berkeley; Washington, Ivan C. Rutledge, Seattle; Ft. Worth and Tarrent County, Van Zandt Smith, Fort Worth.

In February of this year, the chairman was asked by the Assistant Director of the Survey of the Legal Profession, Mr. Robert O. Porter of Boston, to assume responsibility for a study of practice before state administrative agencies, to determine to what extent practice before such agencies is confined to regularly-admitted lawyers or may be also engaged in by layman. It was contemplated that our Committee on State Administrative Law would be utilized in carrying out the project. With considerable misgiving, and only after consultation with Chairman Hall and the members of the advisory committee, I consented to take on the chore. It is a wholly worth-while endeavor; and I hope we shall succeed in presenting a creditable report. It is not an easy assignment, as I have found in looking into the problem here in Arizona.

Your Committee's recommendations are few and not especially important:

1. The duties of the standing committees of the Administrative Section should be more clearly defined and their functions covered concretely by the by-laws of the Section. We do not know whether we are trespassing on the domain of the Committee on Administrative Rules and Rule-Making, or of the National Committee, or on the prerogatives of the chairman of the Section himself.

2. The officers and the council of the Section should consider ways and means to make the operation of this committee more wieldy and its work more effective. At present the burden of correspondence on the chairman is too great; and the lack of a more direct contact than now exists leads to ineffectiveness. A vice-chairman for each federal judicial district might be the answer. These vice-chairmen could serve as an advisory committee, in lieu of the present temporary one, and correspondence and communications from the chairman to the members could be distilled through the vice-chairmen. The vice-chairmen would have the advantage of personal acquaintance with the members, and recommendations for appointments should originate with them.

The chairman expresses thankful recognition of the constant courteous helpfulness of the chairman of the Section, and of the helpful attitude and cooperation of most of the members of the committee.

CHARLES H. WOODS, Chairman.

APPENDIX. The answers to the questionnaire referred to in the text of the Report reveal the following legislative activity in addition to that discussed in the article on "Recent State Administrative Procedure Legislation," in the January 1948 issue of the *Iowa Law Review*.

In Alabama, legislation on this subject was introduced in 1947 and passed the House but failed in the Senate. There is a possibility that this legislation will be passed during the current session of the Legislature.

In Arizona, there are no general requirements with respect to rule making, but § 56-1011A of Arizona Code Ann. adopted in 1941 requires that rules of the Arizona Employment Security Commission may be adopted only after public hearing or opportunity for hearing. General rules become effective 10 days after filing with the Secretary of State and published in one or more newspapers of general circulation in the

state. The State Bar of Arizona has recommended that the Legislature pass legislation providing for the filing of all administrative rules and regulations with the Secretary of State.

In Illinois legislation has just been enacted at the 1951 session of the Legislature requiring the filing of administrative regulations with the Secretary of State as a condition of their effectiveness. Certified copies are to be supplied at an appropriate charge to persons requesting them. This legislation was recommended by the Administrative Practice and Procedure Commission of the State.

APPENDIX-2 Kansas General Statutes 1949, 77-405 to 77-414, requires State agencies to file every regulation issued by them and every amendment and revocation thereof with the Revisor of Statutes. Each regulation must include a citation of the authority pursuant to which it was adopted.

Maryland in Code art. 41, § 7A as amended by Laws 1949, ch. 738, requires that every rule or regulation issued by an officer or department of the executive branch be submitted to the Attorney General of Maryland for approval as to its legality. Copies of such regulations must also be filed with the Clerk of the Court of Appeals, the Secretary of State, and the Department of Legislative Reference. The Secretary of State is directed to cause such regulations as are filed with him to be printed for distribution to state officials and for sale to the general public.

Nebraska Rev. Stat. 1949 Cum. Sup., §§ 84-901 to 84-906, provides for the filing with the Secretary of State of all rules and regulations issued by state administrative agencies. Compilations of such rules are to be made periodically by each agency, and are to be available on request at an appropriate charge.

The New Jersey Constitution of 1947, Art. 5, § 4, Par. 6, provides that rules and regulations of state administrative agencies must be filed "either with the Secretary of State or in such other manner as may be provided by law" before they become effective. It also directs that "the Legislature shall provide for the prompt publication of such rules and regulations." No implementive legislation has as yet been enacted although a proposed general Administrative Procedure Act has been introduced during the past two or three legislative sessions.

APPENDIX-3 In Oklahoma a bill comparable to the Model State Administrative Procedure Act was passed by the Legislature in 1949, but was vetoed after adjournment by the Governor. The Oklahoma Bar Association has endorsed and worked for the passage of the Model Act which will probably be introduced again.

In Pennsylvania a bill has been introduced in the current session of the Legislature amending PL-1388, 1945 and providing for the filing of administrative regulations with the Department of State which is to maintain a permanent record of such regulations and to provide certified copies of such regulations upon the payment of appropriate charges. The Department is also directed to prepare and publish at such times as it shall determine an index of all regulations on file with it and periodical supplements thereto. We have not been informed as to the ultimate fate of this bill.

In West Virginia there was introduced in the Legislature in 1951 a general administrative procedure bill which provided among other things for the filing and publication of

administrative rules and regulations. The bill was tabled by the Judiciary Committee of both the House and Senate for the ostensible reason that it would be too expensive for the State.

In Wisconsin there has been no additional legislation on this subject since the Wisconsin Administrative Procedure Act adopted in 1943 but it is interesting to note that the Supreme Court of Wisconsin has recently rendered a decision holding invalid rules that were not filed in accordance with the statute. See *Mondovi Cooperative Equity Assn.* v. *State,* 258 Wis. 505, 46 N. W. 2d 825 (1951).